89-476 (1)

No. - .

Supreme Court, U.S.
FILED
SEP 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

# In the
# Supreme Court of the United States.

OCTOBER TERM, 1989.

TOWN OF HULL, MASSACHUSETTS,
E. RENO CONSTANTINIDES,
NANCY BURNS, CLAUDETTE FITZSIMMONS,
AND MYRON KLAYMAN, INDIVIDUALLY
AND IN THEIR OFFICIAL CAPACITIES
AS SELECTMEN,
PETITIONERS,

*v.*

DAVID B. MILLER, NANCY E. DUNN,
—AND RICHARD A. MUSMECI,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

## Petition for Certiorari.

MITCHELL J. SIKORA, JR.,*
VINCENT L. DICIANNI,
FERRITER, SCOBBO, SIKORA,
CARUSO & RODOPHELE, P.C.
One Milk Street,
Boston, Massachusetts 02109.
(617) 423-0830

**Counsel of Record*

September 19, 1989

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

140 pp

## Questions Presented.

I. (a) Whether the decisions of the members of a municipal redevelopment authority obligating town funds to the construction of a controversial subsidized housing facility comprise First Amendment expression.

(b) Whether such First Amendment expression would constitute a right so well settled or clearly established as to expose municipal selectmen to individual liability for compensatory and punitive damages under 42 U.S.C. § 1983 as a result of their suspension of certain redevelopment authority members upon state statutory grounds of inefficiency and neglect of duty in their pursuit of the project.

II. Whether the failure of the suspended redevelopment authority members to complete the statutorily prescribed municipal removal hearing, or to appeal the selectmen's decision of removal to the prescribed state trial court, constitutes *res judicata* precluding a subsequent original § 1983 damages action against the selectmen in a federal district court within the doctrine of *Allen* v. *McCurry*, 449 U.S. 90 (1980), because the municipal determination qualified as administrative *res judicata* under governing state law; or whether the abandonment of the municipal removal hearings, or the failure to appeal the decision of removal to the state trial court, comprises a mere failure to exhaust state administrative and judicial remedies within the doctrine of *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496 (1982).

III. Whether, in a § 1983 jury trial for personal damages, the federal district court's exclusion from evidence of the defendant selectmen's detailed written findings, reasoning, and decision of removal of the plaintiff redevelopment authority members deprived the selectmen of their entitlement to establish qualified immunity by demonstration of their good faith exercise of judgment upon reasonable grounds.

## Parties to the Proceeding.

*Respondents, Plaintiffs*. The respondents below were the following plaintiffs.

1. David B. Miller.
2. Nancy E. Dunn.
3. Richard A. Musmeci.

*Petitioners, Defendants*. The petitioners below were the following defendants.

1. Town of Hull, Massachusetts.
2. E. Reno Constantinides, former selectman.
3. Nancy Burns, former selectwoman.
4. Claudette Fitzsimmons, selectwoman.
5. Myron Klayman, former selectman.

## Table of Contents.


Questions presented i

Parties to the proceedings iii

Table of authorities cited vi

Opinion below 2

Jurisdiction 2

Constitutional and statutory provisions involved 2

Statement of the case 3

Argument for allowance of writ of certiorari 15

I. The Circuit Court erroneously characterized the redevelopment authority's financial decisions as First Amendment speech; and erroneously held that character to be so well settled or clearly established as to trigger individual damages liability under 42 U.S.C. § 1983 15

A. The Circuit Court mistakenly characterized the redevelopment authority's financial decisions as First Amendment speech 15

B. The asserted First Amendment right was not so well settled or clearly established as to trigger individual damages liability under 42 U.S.C. § 1983, or as to justify the award of substantial punitive damages against the selectmen 21

II. The doctrine of issue preclusion expressed in *Allen* v. *McCurry*, 449 U.S. 90 (1980) bars the present lawsuit as an original action in the federal district court 23

III. The exclusion from evidence of the selectmen's administrative findings, reasoning and decision effectively deprived them of the right to prove their qualified immunity 26

Conclusion 29

Appendix follows page 29

## Table of Authorities Cited.

CASES.

Allen v. McCurry, 449 U.S. 90 (1980) 23, 24, 25, 26

Almeida v. Travelers Ins. Co., 383 Mass. 226, 418 N.E.2d 602 (1985) 24, 25

Anderson v. Creighton, 483 U.S. 635 (1987) 22

Berry v. Bailey, 726 F.2d 670 (11th Cir. 1984) 20

Branti v. Finkel, 445 U.S. 507 (1980) 21

Bunte v. Mayor of Boston, 361 Mass. 71, 278 N.E.2d 336 (1972) 23

Connick v. Myers, 461 U.S. 138 (1983) 20

Elrod v. Burns, 427 U.S. 347 (1976) 21

Estrada-Adorno v. Gonzales, 861 F.2d 304 (1st Cir. 1988) 20

Fiacco v. City of Rensselaer, 783 F.2d 319 (2d Cir. 1986), cert. denied, 480 U.S. 922 (1987) 28n

General Foods Corp. v. Massachusetts Department of Public Health, 648 F.2d 784 (1st Cir. 1981) 24

Gildea v. Ellershaw, 363 Mass. 800, 298 N.E.2d 847 (1973) 23

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 22, 26

Jiminez Fuentes v. Torres Gaztambide, 807 F.2d 236 (1st Cir. *en banc* 1986) 21

Maine v. Thiboutot, 448 U.S. 1 (1980) 23

TABLE OF AUTHORITIES CITED.

Mauldin v. Upjohn Co., 697 F.2d 644 (5th Cir. 1983), cert. denied, 464 U.S. 848 (1983) 28n

Mitchell v. Forsyth, 472 U.S. 511 (1985) 26

Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982) 24, 25, 26

Redgrave v. Boston Symphony Orchestra, Inc., 399 Mass. 93, 502 N.E.2d 1375 (1987) 16n

Rzeznick v. Chief of Police of Southampton, 374 Mass. 475, 373 N.E.2d 1128 (1978) 23

Smith v. Wade, 461 U.S. 30 (1983) 22

Wood v. Strickland, 420 U.S. 308 (1975) 22

United States v. Moore, 732 F.2d 983 (D.C. Cir. 1984) 28n

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution

First Amendment 20, 22, 23

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1738 24, 25

42 U.S.C. § 1983 2, 3, 15, 16n, 20 et seq.

Massachusetts General Laws

c. 12, § 11I 16n

c. 121B, § 4 3

c. 121B, § 5 4

c. 121B, § 6 5, 23

c. 121B, § 11 3

c. 121B, § 45 3, 4

c. 121B, § 46 3

c. 121B, § 47 3

c. 121B, § 48 3

c. 121B, § 52 5
c. 249, § 4 23

FEDERAL RULES.

Federal Rules of Appellate Procedure
Rule 40(a) 2, 19n

Federal Rules of Evidence
Rule 403 27

No. - .

# In the

# Supreme Court of the United States.

OCTOBER TERM, 1989.

TOWN OF HULL, MASSACHUSETTS,
E. RENO CONSTANTINIDES,
NANCY BURNS, CLAUDETTE FITZSIMMONS,
AND MYRON KLAYMAN, INDIVIDUALLY
AND IN THEIR OFFICIAL CAPACITIES
AS SELECTMEN,
PETITIONERS,

*v.*

DAVID B. MILLER, NANCY E. DUNN,
AND RICHARD A. MUSMECI,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

## Petition for Certiorari.

The Petitioners, individual former selectmen and the Town of Hull, Massachusetts, respectfully pray that the Court issue

a Writ of Certiorari to review the judgment of the Court of Appeals for the First Circuit entered on June 21, 1989.

## Opinion Below.

The opinion of the Court of Appeals is reported at 878 F.2d 523 (1st Cir. 1989).

## Jurisdiction.

The Court of Appeals entered judgment on June 21, 1989. Pursuant to F.R.A.P. 40 (a), the appellants submitted a petition for rehearing on July 5, 1989. The Court of Appeals denied the petition on July 26, 1989.

The Court derives jurisdiction of the case from 28 U.S.C § 1254(1), authorizing review by grant of petition for certiorari in cases in the courts of appeals.

## Constitutional and Statutory Provisions Involved.

The case involves the following constitutional and statutory provisions.

1. United States Constitution, Amendment I, in pertinent part, as applied to the states through the Due Process Clause of the Fourteenth Amendment:

> Congress shall make no law . . . abridging the freedom of speech, . . .

2. 42 U.S.C. § 1983 in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

> or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

## Statement of the Case.

1. *The Background of the Hull Redevelopment Program.*

In accordance with Massachusetts enabling legislation, the Town Meeting of the Town of Hull in 1961 voted to organize and empower a redevelopment authority. M.G.L. c. 121B, § 4. State law assigned to municipal redevelopment authorities the purpose of eliminating "substandard, decadent or blighted open areas . . . as a growing menace . . . to the safety, health, morals and welfare of the residents of the commonwealth, . . ." M.G.L. c. 121B, § 45, first paragraph. It directed the redevelopment authorities to undertake "the acquisition, planning, clearance, conservation, rehabilitation or rebuilding" of such areas for improved public and private use. *Id.*

As the main instruments of that mission, the Legislature authorized the local redevelopment authorities to exercise the power of eminent domain and to participate in programs and agreements bringing funds, by grant or loan, from municipal, state, and federal agencies. M.G.L. c. 121B, §§ 11, 46, 47. State law required for every local urban renewal project the prior submission of a conforming plan to the governing "municipal officers," approval by those officers, and further submission to, and approval by, the Massachusetts Department of Community Affairs. M.G.L. c. 121B, § 48.

In accordance with M.G.L. c. 121B, § 5, the Hull Redevelopment Authority (HRA) consisted of five members, four of whom achieved office by municipal general election and one of whom by appointment from the state Department of Community Affairs. M.G.L. c. 121B, § 4. After initial staggering, all terms consisted of five years. *Id.*, fifth paragraph.

During the period 1961 to 1968, the HRA considered and formulated a Hull Urban Renewal Plan. On May 13, 1968, it submitted the Plan to the Town Meeting as the municipal governing body. The Town Meeting voted its approval.

The Plan called for the acquisition, clearance, and redevelopment of approximately 33 acres of land lying mid-way up the north-south peninsula comprising Hull's main land mass and extending across the peninsula from the Atlantic beach front on the east to the back bay and tidal marshes on the west. The numerically designated constituent parcels had intended uses for multi-family residential, local commercial, commercial-recreation (hotels, motels, inns and marinas) and park purposes and subservient road and parking areas. Substantial amendment to the Plan required renewed approval of the Town Meeting.

Immediately upon Town Meeting approval, the HRA and the Board of Selectmen executed the project Cooperation Agreement of May 15, 1968. That document called generally for cooperative effort between the town government, the Authority, and the federal Department of Housing and Urban Development. As a condition of loans and grants from HUD to the HRA, it obligated the Town (1) to finance one-fourth the net project cost; and (2) to finance all additional costs determined to be ineligible for reimbursement under the HRA's grant-and-loan agreements with HUD. As a significant additional term, the Cooperation Agreement provided that the Town and the HRA could amend the Agreement with the consent of HUD. As of May 15, 1968, the estimated net project cost was $2,395,958 and the Town's 25% liability therefore an estimated $598,989.50.

2. *The Legal and Financial Relationship of the Selectmen and the HRA.*

In addition to the Cooperation Agreement, several statutory sources filled out the legal relationship of the Selectmen and the HRA. First, the state enabling legislation commanded each local redevelopment authority to "keep an accurate account of all its activities, receipts and expenditures" and each January to make a report of the same to the state auditor and the appropriate selectmen. M.G.L. c. 121B, § 52, first paragraph.

Second, M.G.L. c. 121B, § 6, first paragraph, authorized the selectmen to suspend, and thereafter upon written charges and hearing (including the right of representation) to remove elected HRA members by reason of "inefficiency, neglect of duty or misconduct in office." During suspension and after removal until election of a successor, the statute authorized the selectmen to appoint substitute members to the Authority. *Id.*

In the usual course of town government the Hull Selectmen functioned as an administrative, rule making, and quasi-adjudicatory body with the assistance of an executive secretary. The ultimate governing body was the Town Meeting vested with exclusive authority to set budgets and to appropriate funds. The Selectmen appointed most town officials and employees for approximately 45 departments and agencies, and monitored the performance and budgets of those bodies. On a weekly basis they supervised the expenditure of all funds authorized by Town Meeting over a span of 40 to 50 categories of disbursement. As a hearing, or quasi-adjudicatory body, they entertained all union grievances; conducted all initial civil service hearings; decided police disciplinary matters; issued all liquors licenses and decided all liquor license sanctions; and determined dog officer complaints. The Selectmen performed their duties on evenings, weekends, and during time taken from their regular occupations. Each received annual compensation of $800.00 (eight hundred dollars).

As to the financial relationship between the Selectmen and the HRA, apart from the Cooperation Agreement covenants, several of the federal grant and loan programs delivered funds from HUD to the HRA through the medium of the Town and the supervision of the Selectmen. Of the three main federal fundings programs, "Urban Renewal" funds flowed directly from HUD to the HRA, while "Urgent Needs" funds and "Community Block Development Grants" came first to the Town as depository, whose accountant and Selectmen then transmitted portions in response to itemized HRA requests as part of a so-called "draw down" process.

A final, significant financial connection existed. Beyond the Town's obligation for 25% of the net project cost and for reimbursement (to HUD or providers) of all ineligible expenditures by the HRA, HUD regarded the Town as an obligor for all HUD notes in the eventuality of HRA bankruptcy or project failure.

3. *The Original Redevelopment Contract with Consultants, Inc.*

On August 8, 1978, the HRA executed a comprehensive contract with the developer, Consultants, Incorporated, of Providence, Rhode Island. Consultants agreed to purchase the redevelopment area, to undertake the necessary site improvements, and to carry out the Redevelopment Plan. During the period from execution through February, 1980, the Consultants contract underwent seven amendments.

On May 28, 1981, HRA counsel William F. Wallace notified Consultants by letter that it was in breach and default of the agreement by reason of (1) its failure to submit construction plans within the specified times; (2) its failure to furnish the HRA with evidence of the necessary equity capital and mortgage financing; and (3) its failure to pay the purchase

price and to take title to the property within the repeatedly amended contractual time limits. Wallace called upon Consultants to cure the defaults within 30 days and advised that, in the absence of cure, the HRA would terminate the agreement and retain the contractual deposit of $120,000 as liquidated damages (Pet. App. at 82a). When Consultants failed to remedy the deficiencies, Wallace by letter of July 1, 1981, notified the developer of termination and retention of the deposit as liquidated damages (Pet. App. at 83a).

4. *The Audit of the HRA for the Period 1976 Through 1980.*

Simultaneously with the pendency of the original Consultants contract, the Hull Selectmen began to form concerns about the management and fiscal practices of the HRA and about the consequent financial exposure of the Town.

Those concerns sharpened in July 1981. At that time a Massachusetts public accounting firm, in fulfillment of HUD requirements, forwarded to the HUD Regional Inspector General for Audit and to the HRA and Selectmen an audit of the HRA's financial and administrative performance during the period April 1, 1976 through December 31, 1980. The audit conveyed a series of criticism.

The audit found that the HRA had maintained no system of approval of expenditures since January of 1978; (2) that the HRA could not account accurately for receipts for the substantial beach front parking lots which it had been operating in the redevelopment area, a fault previously identified by the state auditor in March of 1980 and still unremedied; (3) that the Authority had no reliable system of accounting for travel expenses, since members and employees did not turn in receipts nor unexpended advances, another fault which the state auditor had identified in March of 1980 and which had remained uncorrected; (4) that during the years under audit it had

budgeted $588,533 for administrative costs but expended $792,102, for an overrun of $203,569; (5) that it had also overrun its budget for legal expenses; (6) that the HRA had budgeted $520,742 for project improvements to the redevelopment area in accordance with the Redevelopment Plan but that it had expended only $135,715 so as to leave the improvements unaccomplished and the resulting value of the land to the purchasing developer correspondingly reduced; (7) that liability for notes payable to HUD amounted to $337,000 for which the Town could be accountable at HUD's option; and (8) that the project cost had reached $4,310,309, for which the Town retained a 25% responsibility in the amount of $1,077,577.

5. *Escalating Events Between the Redevelopment Authority and Selectmen.*

After the termination of the Consultants contract and the publication of the audit report during the first half of 1981, the Selectmen voted to place before a Special Town Meeting of September an article proposing a petition to the Legislature for the enactment of special legislation enabling the Town to conduct a binding referendum upon the issue of the abolition of the HRA and the transfer of its function to an alternate municipal body. The financial responsibility of the HRA and its failure to construct a single building during the 13-year period since the electorate's adoption of the renewal plan had become issues of public attention. The HRA opposed the article by means of a public letter to the electorate and by litigation in the state superior court unsuccessfully seeking to enjoin consideration of the article by Town Meeting. The Town Meeting approved the article by a two-to-one margin (Pet. App. at 87a).

Also at the Special Town Meeting of September the voters approved the reestablishment of a 40-foot height restriction

upon all structures in the Town, including the urban renewal area, a provision which altered the 1968 Town Meeting Urban Renewal Plan authorization of heights up to 140 feet.

During October, November, and December a series of correspondence unfolded over the subject of the HRA's financial status. For a number of years the HRA had not produced the annual January accounting mandated by state law for delivery to the Selectmen and the state auditor. M.G.L. c. 121B, § 52. In October the Selectmen requested a copy of the HRA's fiscal year budget. In December they itemized to the HRA further questions about income sources, current obligations — especially HUD votes —, potential state aid, and the Town's exposure; and invited the HRA membership to a joint meeting to discuss the resulting data among themselves and with HUD. The HRA deferred the subject of a meeting and in late February of 1982 voted not to meet with the Selectmen.

The Selectmen attempted other communication. As the result of an HRA overdraft upon the "Urgent Needs" account, the Selectmen directed their executive secretary to advise the HRA of the current shortage. He wrote to HRA Chairman Miller on December 16, 1981.

> Dear Mr. Miller:
>
> The Board of Selectmen voted at its December 12, 1981 meeting to request the Hull Redevelopment Authority not to make any further commitments for which there are no funds.
>
> Your cooperation will be appreciated.
>
> Sincerely,
>
> Christopher J. McCabe
> Executive Secretary

On December 18, Miller, a 13-year member of the HRA, replied:

Dear Mr. McCabe:

Received your letter of December 16, 1981, whereby the Board of Selectmen request that the Hull Redevelopment Authority cease to function as an elected authority.

As Brigadier General Anthony C. McAuliffe, Commanding Officer of the beseiged 101st Airborne Division at Bastogne, replied to General Heinrich von Luttwitzk, Corps Commander of the S.S. Panzer Lehr Division and 26th Volks Grenadier Division, "NUTS!"

Sincerely,

David B. Miller, Chairman

On December 30, the HRA's chief executive officer informed the members that the authority had only $30,000 remaining in its operating budget, that it could not afford to contract for any further services, and that it must consider the abandonment of the renewal plan if it could not engage a developer within 12 months.

Also on or about December 30, 1981, the HRA voted to approve a new development contract negotiated and executed on or about December 21 with Consultants Incorporated, denominated as "Amendment Eight" to the original contract. Under its terms Consultants would purchase one redevelopment area parcel on the bay side (Parcel 14A) and erect an eleven-story elderly housing tower. Consultants would pay $180,000 for the parcel and surrender all claims under the original contract to purchase and develop any other area parcels. Amendment Eight resulted from closed negotiations and was not made public until January 8, 1982.

6. *Climactic Events.*

At its meeting of January 8 the HRA members discussed the HUD notes in the amount of $268,000 due at the end of June and concluded that the Town would have to assume that debt in the event of the Authority's default.

On January 14, 1982, all five Selectmen met with HUD officials at the Boston regional office in order to acquire additional information about the HRA's financial status and the Town's obligations. At that meeting the HUD officers confirmed that agency's view that, in addition to Cooperation Agreement liability, the Town was responsible for the payment of $268,000 in HUD notes at the end of June, 1982, if the HRA were to default. As of November 30, 1981, the HRA's accountant had reported that its liabilities now ($4,440,561) exceeded its receipts ($3,891,540) by $549,021. On February 2 the Selectmen wrote to HUD, and on February 17 to the HRA, in request of a comprehensive conference about finances. They received no reply.

At their own regularly scheduled public meeting on February 26, the HRA members vetoed the proposal of a comprehensive meeting with HUD and the Selectmen upon the subject of finances (over the objection of one HRA member); acknowledged that the HRA was now "broke;" and concluded that it must operate over budget.

As a result of their attendance in the audience of this meeting, selectmen Burns and Constantinides met at the Town Hall on Sunday, February 26, spoke by telephone with town counsel, and discussed and drafted charges of inefficiency and neglect of duty against HRA members.

7. *The Preparation of Charges and the Commencement of Hearings.*

On February 28 Burns and Constantinides drafted 11 charges or specifications of inefficiency or neglect of duty. Prior to

the regularly scheduled meeting of the Selectmen on the following evening, March 1, they presented the charges to other Selectmen and to town counsel for review and advice. Counsel examined and discussed each charge with them, was satisfied of the reasonable cause for each, recommended certain changes of language, and described the procedure to be followed for service, notice, suspension, and hearings under the statute. At the hearing the Selectmen voted (with one dissent) to bring the charges, to suspend the HRA members, and to appoint replacements pending the completion of hearings scheduled to begin on March 29.

A settlement meeting of parties and counsel on March 3 proved unsuccessful. During the ensuing week the replacement members of the HRA produced documents generating six additional charges of inefficiency and neglect of duty against the suspended members.[1]

---

[1] The aggregate 17 charges reduced to the following specifications (Pet. App. at 75a-81a);

1. inefficient and negligent management of finances, especially the expenditure of federal grants, rendering the Authority unable to meet the imminent HUD project notes of $268,000;

2. inefficient and negligent management of finances causing the loss to the Town of $304,000 of federal Community Development funds by reason of their diversion by HUD from general municipal purposes to underfinanced project purposes;

3. the intended continuation of such financial practices upon the assumption of the Town's continuing indemnity function under the Cooperation Agreement;

4. the failure to secure an adequate level of Massachusetts urban renewal financial assistance as authorized by statute;

5. the failure to employ a qualified executive director and the consequent need to contract his functions to independent consultants at substantial fees;

6. the failure to remedy adverse publicity resulting from the existing executive director's published derogatory characterization of the project;

7. the failure for some years to decide upon the disposition of the renewal zone parcel containing the municipal light plant and the resulting inablity of the municipal light board to plan its future;

8. the expenditure of funds upon studies for the construction of a marina on certain bay side parcels and the inconsistent commitment of one parcel to the elderly high rise structure so as to prevent the construction of a marina at any of the studied sites;

The three suspended HRA members (Miller, Musmeci, and Dunn) retained counsel. Town counsel met with those attorneys several times prior to the beginning of the hearings on March 29 concerning the substance of the changes and process of the hearings.

The respondents were entitled to have advance notice of witnesses, to question witnesses, to call their own witnesses, to request, examine, and introduce documents, to file written answers to the charges, and to participate in scheduling. As chairman and presiding officer at the opening hearings, selectman Constantinides restated those procedural rights. Town Counsel attended all sessions and advised the Selectmen upon the conduct of the hearings.

Settlement discussions among counsel before both the first and second sessions proved unsuccessful. At the beginning of

---

9. the accomplishment of substantial changes in the 1968 Urban Renewal Plan without the required approval of Town Meeting, and in particular the execution of Amendment Eight providing for a high-rise structure in contradiction of the 40-foot height restrictions voted by the Town Meeting in September, 1981;

10. the failure by Amendment Eight and otherwise to require a developer to proceed simultaneously with elderly housing construction and commercial/luxury structures, the linkage of which furnished the premise for the Selectmen's 1977 commitment of 150 elderly/handicapped units to the urban renewal area;

11. the assignment of all significant tasks to outside consultants and counsel at substantial expense, despite a representation to the public of expertise in urban renewal matters;

12. inaccurate recordkeeping and accounting for funds owed for the construction of a major roadway in the renewal zone;

13. substantial overruns of the calendar year 1981 operating budget and of the 1982 fiscal year budget;

14. a precipitous and wasteful lawsuit by the HRA against the Town for a $38,546 claim without opportunity for discussion or settlement of the claim by the Selectmen;

15. inefficient and neglectful operation of the renewal area beach front parking lots with resulting losses of revenues during prior years;

16. inefficient and wasteful expenditures for travel, lodging, and meals on the part of members and the executive director; and

17. violation of the state Open Meeting Law by reason of the conduct of business at restaurant events despite earlier violation and warnings.

the third session, Miller, Musmeci, and their attorneys announced that they were quitting the hearings, and walked out. By letter of April 4 to the Town Clerk, Miller announced that he would not participate further in the hearings and that he was resigning from the Authority (Pet. App. at 88a). By letter of April 6, Musmeci did the same (Pet. App. at 89a).

8. *The Hearings.*

Mrs. Dunn chose to go forward, now without counsel. She filed written answers to the charges. By letter of May 11, 1982, she requested the Selectmen to render a decision upon removal without any further hearings (Pet. App. at 90a). Town Counsel advised the Selectmen that they must consider evidence upon any changes which they wished to decide.

The hearings proceeded through a total of 19 sessions over 13 months. At Mrs. Dunn's request, the Selectmen recessed the sessions for the period December through February. They comprehended approximately 80 hours of hearing time, 17 witnesses, and more than 2,000 documentary exhibits. The selectmen participating in the final decision (Burns, Fitzsimmons, Klayman) each reviewed tape recordings of all the sessions. Mrs. Dunn called and examined witnesses, received copies of all documents, received tape recordings of all sessions, and participated in the scheduling of all hearings.

9. *The Final Decision.*

On March 12, 1983, the Selectmen rendered a final decision of all charges. It consisted of findings under each of the 17 charges comprising 96 single-spaced legal pages. Constantinides' term as Selectman had expired in May, 1982, and he had not sought reelection or participated in the hearings beyond that point. Burns, Fitzsimmons, and Klayman concluded that

the evidence sustained 15 of the 17 charges against Mrs. Dunn and voted by a 2 to 1 margin to remove her from the Authority. Selectman Klayman voted against the sanction of removal upon the grounds that Mrs. Dunn had acquired a new understanding of her office from the hearings and that the successor members of the Authority would assure its improved performance. Mrs. Dunn did not appeal the decision or pursue any action in the Massachusetts courts.

## Argument.

For the following reasons the Court should grant the writ.

I. THE CIRCUIT COURT ERRONEOUSLY CHARACTERIZED THE REDEVELOPMENT AUTHORITY'S FINANCIAL DECISIONS AS FIRST AMENDMENT SPEECH; AND ERRONEOUSLY HELD THAT CHARACTER TO BE SO WELL SETTLED OR CLEARLY ESTABLISHED AS TO TRIGGER INDIVIDUAL DAMAGES LIABILITY UNDER 42 U.S.C. § 1983.

A. *The Circuit Court Mistakenly Characterized the Redevelopment Authority's Financial Decisions As First Amendment Speech.*

The Court of Appeals held that the Selectmen's commencement and conduct of suspension-and-removal proceedings violated the First Amendment right of "a member of a public agency or board" to "vot[e] on public issues." 878 F.2d at 532; Pet. App. at 18a. The court acknowledged that "we have found no cases directly on point," but concluded that "[t]here can be no more definite expression of opinion than by voting on a controversial public issue" [footnote omitted].

878 F.2d at 532; Pet. App. at 18a. In the absence of precedent, it cited for analogy several cases in which state governments had attempted to prevent the seating or voting of elected legislators, 878 F.2d at 532-533; Pet. App. at 19a-21a;[2] and cases of retaliation against public employees for their protected expression, *id*. It concluded that the evidence warranted the finding that "plaintiffs were removed for speaking out and voting for a project [the elderly housing tower] to which the [Selectmen] were opposed." 878 F.2d at 533; Pet. App. at 21a.[3]

The Court of Appeals devoted minimal attention or analysis to the binding financial character of the HRA's "voting" or

---

[2] At trial all three plaintiffs testified that, throughout their years of dialogue, no defendant had ever attempted to interfere with their exercise of expression or voting at the HRA; and that no defendant had ever expressed any ill will or vindictiveness toward them.

[3] As the court mentions, the same action would constitute a violation of the other theory of liability in the case, the Massachusetts Civil Rights Act. That statute assimilates as an actionable wrong any violation of federal constitutional rights, M.G.L. c. 12, § 11I:

> Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, [by threat, intimidation, or coercion] . . . may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief . . . including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

The trial judge instructed the jury that in the circumstances of this case a finding of a violation of the federal civil rights act would by definition amount to a finding of violation of the Massachusetts civil rights act. He excluded all requested instructions concerning the Massachusetts Constitution. Consequently liability under both the federal and state civil rights acts here derives from the same First Amendment theory, and will stand or fall with that theory. The Massachusetts Supreme Judicial Court has held that liability under the state statute will generally be "coextensive" with § 1983. *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 99; 502 N.E.2d 1375, 1378 (1987).

effective decision making. As recounted above, the Redevelopment Authority's decision to construct an elderly housing tower on a particular tract carried with it municipal financial liability for 25% of the net project cost, responsibility for all related expenditures deemed unreimbursable by HUD, and responsibility for all related HUD notes.

The court made only glancing reference to the Selectmen's continuous financial concern with the actions of the HRA. It observed without further comment that the Town had "to pay for 25% of the project in 'cash or non-cash grants in aid.'" 878 F.2d at 526. In footnote 5, 878 F.2d at 538, Pet. App. at 8a, it stated that the Selectmen's charges involved a "potpourri" including "financial irregularities." The lower court's denigration of the charges does it no credit. They convey variant episodes of a central theme stated in the opening sentences of the first specification (Pet. App. at 75a).

> You have neglected to manage your financial affairs prudently and efficiently. You have expended funds and made commitments, explicit or implied, to expend funds that to the best of our knowledge are in excess of the funds available to you.

As to the elderly housing tower in particular, the Selectmen's financial concern was acute because the HRA by confidential negotiation had reinstated (by Amendment Eight) at the end of 1982 the same developer (Consultants, Inc.) which it had dismissed six months earlier for failure to submit construction plans within deadlines; failure to furnish documentation of the necessary equity capital and mortgage financing; and failure to pay the purchase price and to take title to the property within even the adjusted contractual time limits (Pet. App. at 82a-83a). The same reinstatement decision forfeited the liquidated damages deposit of $120,000 (Pet. App. at 82a, 86a) at a time

when the Redevelopment Authority had reached the bottom of its funds and looked to the Town for indemnification and operating expenses. Despite these undisputed facts, the Court of Appeals insisted upon the elderly housing project decision as an exercise of "political expression." 878 F.2d at 532 n. 13; Pet. App. at 18a-19a.[4] Yet the HRA could, and did, commit

---

[4] In the court's words: "When it is clear, as here, that *political expression* is not a legal or otherwise appropriate basis for defendants to have suspended or dismissed the public officials in question, then such a retaliatory suspension or dismissal violates the official's First Amendment rights" [emphasis supplied].

The circuit court's exclusion of the financial character of the HRA's elderly-housing-project course of action reaches extraordinary lengths. The court's history of the developer's contract runs as follows, 878 F.2d at 526; Pet. App. at 4a:

> In 1978, the HRA entered into a contract with Consultants, Inc. (Consultants) for the redevelopment of the entire 33 acre tract. Part of this contract called for the construction of a housing building for the elderly with 150 units: Over the next three years this contract was amended several times *in ways not relevant to this case*. In December 1981, an eighth amendment was added. In this amendment, Consultants agreed to give up its rights to develop the entire tract and to go forward with only the housing project for the elderly [emphasis supplied].

Compare, as an accurate history, the omitted episode of the developer's termination for massive nonperformance, especially financial defaults, and the six-month period of July 1 to December 30, 1981, without a development contract or commitment (Pet. App. at 82a-83a, 86a).

On May 28 HRA counsel had written Consultants, Inc., "that you are in default of or breach of [the development] Agreement as follows:

1) You have failed to submit construction plans as required by the Agreement within the times specified.

2) You have failed to furnish the Hull Redevelopment Authority with evidence that you have the necessary equity capital and mortgage financing, in satisfactory form and in the manner and by the dates respectively provided in the Agreement, as amended.

3) You have failed to pay the purchase price and take title to the property within the times required by the Agreement, as amended.

The letter gave the developer 30 days to cure the defaults.

the Town's finances to 25 percent of every approved net project cost and to indemnification obligations to HUD. The Redevelop-

---

On July 1 the HRA counsel terminated the developer and claimed the liquidated damages sum of $120,000:

> Inasmuch as you have failed to cure the defaults and or failures in connection with the Land Disposition Agreement executed by Consultants, Inc. and the Hull Redevelopment Authority on August 8, 1978 as demanded in my letter to you of May 28, 1981, please be advised that the Hull Redevelopment Authority exercises its option to terminate said Agreement.
>
> . . .
>
> Demand is hereby made . . . for the penal sum of $120,000.

By means of a petition for rehearing pursuant to F.R.A.P. 40(a), the Selectmen sought unsuccessfully to bring this and other undisputed facts of financial significance to the circuit court's attention, Pet. App. at 26a, 32a-37a, but without success, Pet. App. at 38a (denial without comment).

That court's refusal to consider the cancellation of the development contract for pervasive nonperformance as "not relevant" or material to the First Amendment question begs away the entire issue of the distinction between political expression and financial action. In this case the omission works particularly insidiously because it leaves unexplained and sinister the Selectmen's responsible financial concern and course of opposition. Thus the Court of Appeals observes that the Selectmen in September 1981 sponsored a 40-foot height restriction in the renewal area, a measure which would have precluded a housing tower. 878 F.2d at 526, 532; Pet. App. at 5a-6a. The omitted episode, of course, reveals that no development contract for such a tower existed after July 1 with which such a measure would interfere.

Other exclusions and characterizations persist as to undisputed facts material to the First Amendment issue and to the Selectmen's exercise of good faith judgment upon reasonable grounds: (1) an incomplete reference to the Selectmen's concern over the location of the tower in the peninsular flood plain and the potential need to evacuate elderly from heights up to 11 stories; (2) the explicit legal authority of the Town meeting to amend the renewal plan by its votes; (3) the irrationality of the hypothesis that the location of a single building of subsidized housing on one of the 33 acres would cause the state Legislature to view the Town as economically revived and no longer needful of authorization for a casino hotel; (4) the exclusion of the Selectmen's maintenance and support of a 150-unit housing assistance plan at all times. 878 F.2d at 526, 533; Pet. App. at 4a-6a, 21a; and (5) the omission of any reference to the magnitude and thoroughness of the Selectmen's 13-month hearing and decisional process.

ment Authority was not an advisory or planning body, or a debating society. It engaged in binding financial action.[5]

Such conduct does not amount to protected First Amendment expression, as posited by the Court of Appeals. The commitment of public finances is action, not speech. While the official actor should not suffer unfair, arbitrary, or otherwise unlawful sanctions for mistaken or imprudent action, he does not possess a constitutional right to spend money imprudently. *Connick* v. *Myers*, 461 U.S. 138, 149-154 (1983) (government employee's grievance questionnaire must be balanced against its disruptive impact upon the agency's work for a determination of its First Amendment protection; protection denied; reversal of § 1983 liability). *Estrada-Adorno* v. *Gonzales*, 861 F.2d 304, 305-307 (1st Cir. 1988) (a government official did not have a First Amendment right against termination caused by her disagreement with the hiring policies of her agency; summary judgment is appropriate against her § 1983 damages claim); and (cited and relied upon the *Estrada* panel) *Berry* v. *Bailey*, 726 F.2d 670, 674-676 (11th Cir. 1984) (a deputy sheriff did not possess a First Amendment right against termination by the county sheriff even by reason of the deputy's opposition to the sheriff's improperly selective law enforcement practices; such activity comprised conduct affecting the operation of the department, not speech; affirmance of entry of judgment n.o.v. against his 1983 damages claim).

Another analogous avenue of First Amendment analysis is available from the doctrine of "political discharge" cases. To determine whether an office holder enjoys First Amendment protection from removal by reason of his political beliefs,

---

[5] As the Selectmen's charges (muted in the account of the Court of Appeals, 878 F.2d at 528 n.5; Pet. App. at 8a n.5) make clear, the dominant and repetitive concern of the Selectmen was not the precise wisdom of the elderly housing tower but rather the financial responsibility of the HRA and the consequent financial exposure of the Town (Pet. App. at 75a-81a).

speech, activity or association, a court determines, first, whether the position includes "decisionmaking on issues where there is room for political disagreement on goals or implementation;" and, if so, whether the position comprehends policymaking or confidential information or communication rendering political affiliation an appropriate criterion. *Elrod* v. *Burns*, 427 U.S. 347, 372-373 (1976); *Branti* v. *Finkel*, 445 U.S. 507, 519 (1980). *Accord, Jiminez Fuentes* v. *Torres Gaztambide*, 807 F.2d 236, 241-242 (1st Cir. *en banc* 1986), *cert. denied* 107 S.Ct. 1888 (1987).

In this instance the role of an elected HRA member is certainly one of policymaking and implementation and often one of confidential communications and decisionmaking (through executive sessions) upon subjects (urban renewal and municipal finances) of inherent controversy and political character, all as reflected in the events underlying the present litigation. By no stretch could HRA membership qualify as a non-political office protected in tenure by the First Amendment.

B. *The Asserted First Amendment Right Was Not So Well Settled Or Clearly Established As To Trigger Individual Damages Liability Under 42 U.S.C. § 1983, Or As To Justify the Award of Substantial Punitive Damages Against the Selectmen.*

The Court of Appeals affirmed judgments against the individual Selectmen for joint and several liability for compensatory damages in the amount of $110,770; and individual liability for punitive damages in the respective amounts of $42,400 (selectman Constantinides); $42,100 (selectwoman Burns); $42,100 (selectwoman Fitzsimmons); and $5,500 (selectman Klayman). 378 F.2d at 528; Pet. App. at 9a.

To overcome the qualified immunity of the individual Selectmen, the plaintiffs must show that the offended constitu-

tional right was so "well settled" or "clearly established" that the defendants did nor should have reasonably comprehended the wrongfulness of their conduct. *Anderson* v. *Creighton*, 483 U.S. 635, 638-639 (1987); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-819 (1982); and *Wood* v. *Strickland*, 420 U.S. 308, 320, 322 (1975).

It is undisputed that the Selectmen requested and received the advice of an experienced town counsel at every stage of the preparation of charges and conduct of the hearings; that they followed the state suspension-and-removal statutory scheme literally even after the resignation of two of the respondents and the proffered waiver of further hearings by the third; and that they rendered a detailed, written decision of findings and conclusions, acquitting the remaining respondent of two of the charges and dividing by a 2-1 vote over the sanction of removal.

The Court of Appeals conceded that it "found no cases directly on point" of the First Amendment violation in 1989, resorted to analogy, and concluded that the First Amendment character of municipal spending decisions was so intrinsic that the Selectmen, and impliedly their town counsel, should have known their efforts to be *malum in se*. If the court could find no governing precedent in 1989, then town counsel and the reliant Selectmen should not be held to a higher standard as of 1982. The state statute, which they scrupulously followed, was at all times entitled to its presumption of constitutionality. The First Amendment nature of the HRA's conduct was not reasonably knowable in 1982 or thereafter. A *fortiori*, the infliction of punitive damages for malevolent behavior is especially unwarranted under the requirements of *Smith* v. *Wade*, 461 U.S. 30, 46-49 (1983). The circuit court's acquiescence in that result is undefensible.

In sum, the First Amendment question at hand is categorical, novel, and widely significant for municipal government:

whether § 1983 personal damages actions will have a new career as a weapon employed *by* local government officials against other such officials in policy disputes easily and colorably couched as exercises in First Amendment freedom. The availability of the rationale below is likely to exert a powerful chill upon the will of local officials to exercise their suspension or removal authority against officials with whom they have experienced any personal or policy conflict. This class of case requires a guiding definition of the First Amendment's place in honestly waged controversies among local officials.

## II. The Doctrine of Issue Preclusion Expressed In *Allen* v. *McCurry*, 449 U.S. 90 (1980), Bars the Present Lawsuit As An Original Action In the Federal District Court.

Under Massachusetts law, all the HRA plaintiffs were free (as Mrs. Dunn did) to see the statutory municipal hearing process to a conclusion, M.G.L. c. 121B, § 6; and to appeal the result to the state superior court by statutory *certiorari*, M.G.L. c. 249, § 4; *Bunte* v. *Mayor of Boston*, 361 Mass. 71, 74; 278 N.E.2d 336 (1972); and to the appellate courts, *id*. In addition they were free to add to the *certiorari* claim in the state superior court a tort action for bad faith removal from local office, *Gildea* v. *Ellershaw*, 363 Mass. 800, 820; 298 N.E.2d 847, 885-889 (1973); and § 1983 damages actions, *Maine* v. *Thiboutot*, 448 U.S. 1, 2-3 (1980); Rzeznick v. *Chief of Police of Southampton*, 374 Mass. 475, 484-486; 373 N.E.2d 1128, 1133-1134 (1978). The plaintiffs Miller and Musmeci quit the municipal hearings, Pet. App. at 88a-89a; and Mrs. Dunn pursued no state court action in consequence of her removal, Pet. App. at 90a.

Massachusetts has adopted the doctrine of administrative *res judicata* making final the adjudication of issues by state and local agencies which litigants then failed to pursue by the prescribed route of review to the state courts, *Almeida* v. *Travelers Ins. Co.*, 383 Mass. 226, 229-231; 418 N.E.2d 602, 605 (1985). The administrative result has the quality of finality entitled to full faith and credit in the federal courts in accordance with 28 U.S.C. § 1738. This Court has affirmed such state court finality for reasons of repose, efficiency, consistency, and comity, against the efforts of plaintiffs to recast their claims in federal district court as § 1983 allegations of constitutional violations. *Allen* v. *McCurry*, 449 U.S. 90, 94, 105 (1980). Failure to appeal the state law adminstrative result is sufficient for finality. *Allen* at 96; *General Foods Corp.* v. *Massachusetts Department of Public Health*, 648 F.2d 784, 786-787 (1st Cir. 1981).

In this case the Court of Appeals rejected the application of *Allen* to the state statutory proceedings and result. It regarded the operation of *Allen* in these circumstances as the requirement of exhaustion of administrative remedies as a prelude to an *original* § 1983 action and therefore as a violation of the holding of *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496, 516-517 (1982). See 878 F.2d at 530 n.9; Pet. App. at 14a.

An important and practical distinction separates the operation of excusal from exhaustion (*Patsy*) from the operation of issue preclusion (*Allen*). Excusal from exhaustion might entitle a § 1983 damages claimant to bypass state administrative and judicial process completely and to proceed *ab initio* to the federal district court with his complaint. It does not entitle him to the dual strategy to undertake that state law process, to sample the probability of success, to break off from that process during or at the conclusion of the administrative or judicial proceeding, and then to begin again in the federal

district court with the same claim colored as a § 1983 lawsuit. The plaintiffs here employed that expedient strategy.

As *Allen* and *Almeida* emphasize, that strategy attempts to achieve two adjudications instead of the one full one to which a litigant is entitled. The operation of issue preclusion eliminates the "cost and vexation" of multiple lawsuits, conserves judicial resources, prevents inconsistent decisions, and encourages reliance on adjudication. *Allen* at 94. Federal court respect for state administrative and judicial process serves the further purposes of comity and the congressional mandate of full faith and credit for state adjudications deemed final. *Allen* at 95-96. 28 U.S.C. § 1738. In Massachusetts a litigant cannot engage in an administrative adjudication, accept an adverse result, ignore his prescribed judicial remedy, and then commence relitigation. *Almeida*, 383 Mass. at 230-231, 418 N.E. 2d at 605. The adverse result is final. *Id.* The federal district court is precluded from its relitigation. *Allen* at 95-96. 28 U.S.C. § 1738.

As a practical matter, the allowance of such relitigation renders the federal district court and its juries as a forum for *de novo* review of the infinite variety of imaginable constitutional allegations by disappointed litigants seeking vindication against state administrative and judicial results. This case is a monument to the duplication and waste designed to be prevented by *Allen*: 19 sessions and 80 hours of administrative hearings; a 96-page decision; the omission of state court review; and complete relitigation of the same factual issues by a 22-day jury trial in the federal district court. Under *Allen*, *Patsy*, and *Almeida*, the plaintiffs could pursue one process or the other; but not both.

The proper operation of issue preclusion in these circumstances would serve several further purposes. One would be the value of qualified immunity relieving defendant officials from the tribulation of the litigation process itself, and not

merely from liability, a value thoroughly ignored in the trial court here. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); and *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985). Further it respects the policies of federalism with appropriate deference for the state legislature's selection of administrative and judicial processes for the settlement of disputes between subordinate state government instrumentalities. Finally it would preserve the resources of the federal courts from the drain and detail of local political controversies of questionable justiciability.[6]

By petition for rehearing the Selectmen unsuccessfully requested the Court of Appeals to reconcile the doctrines of the *Allen* and *Patsy* decisions in the present circumstances. Pet. App. at 28a-31a. It declined. Pet. App. at 38a. We respectfully renew the request.

## III. The Exclusion From Evidence of the Selectmen's Administrative Findings, Reasoning, and Decision Effectively Deprived Them of the Right To Prove Their Qualified Immunity.

The trial judge excluded the Selectmen's final written decision of the 17 charges (Pet. App. 91a-97a). It contained their summary of evidence, finding, and application of the statutory standard of "inefficiency" and "neglect of duty" to each of the charges. The 96-page decision rendered at the conclusion of the hearings applied specifically to Mrs. Dunn. She identified its findings of inefficiency and neglect on 15 charges as the

[6] Here, for example, it fell to the jury after 19 days of evidence to determine the rationality or wisdom of detailed financial, design, and construction features of the Town's urban renewal progress over a period of years; and thereby to judge the fitness of the Authority members in the manner of a personnel board reviewing the work of the Selectmen.

cause of the harm (reputational, emotional, and physical) for which she claimed and received compensatory and punitive damages (Pet. App. at 98a-99a).

An important additional feature of the decision was its detailed substantiation of the information and reasoning upon which the Selectmen had found reasonable cause to commence the suspension-and-removal process against Miller and Musmeci, as well.

The defendants offered it on the ground that it was probative of the validity of the original charges against all HRA members and the ultimate removal of Mrs. Dunn; of the rational basis for the charges; and of the good faith and diligence of the Selectmen in their hearings and conclusion. Additionally, it reflected the procedural due process extended to the HRA members. The judge at first agreed (Pet. App. at 93a): "Isn't this clearly so?", but then concluded that the decision could be cumulative of oral testimony and flawed by hearsay quality information (*id.* at 95a-97a) despite defense counsel's proposal of an instruction limiting its use to consideration of the Selectmen's good faith and not the truth of its content (*id.* at 93a).

The jury, never seeing the decision, found that the Selectmen did not act with good faith and upon reasonable grounds in the suspension and removal proceeding and awarded Mrs. Dunn $47,600 in compensatory and $43,700 in punitive damages (Pet. App. at 42a). In effect that verdict is blindfolded assessment of the quality and motivation of the Selectmen's work.

The Court of Appeals characterized the issue as a commonplace balancing test under Federal Rule of Evidence 403, in which the prejudicial potential of the written decision and its cumulative nature might "substantially outweigh" its probative value. 878 F.2d at 529; Pet App. at 11a-12a.

The suppression of the defendant officials' quasi- adjudicatory work product was not a run-of-the-mill evidentiary ruling, but rather a critical deprivation of their right to prove their qualified immunity. The document lodged at the heart of the case as the source of the plaintiff Dunn's injury, on the one hand; and as the distillation of the Selectmen's rationally based exercise of good faith toward all the HRA members, on the other. The ruling was not the usual ineffectual evidentiary error, but one so pervasive and critical as to determine the entire verdict.[7] It frames the general question whether local governmental officials charged with personal monetary liability under § 1983 in the performance of their quasi-adjudicatory functions are entitled to the introduction of their work product as a matter of right in order to vindicate their qualified immunity.

[7] The trial judge rejected the remedy of a limiting instruction despite the usefulness of that measure (Pet. App. at 93a, 97a). See *Fiacco* v. *City of Rensselaer*, 783 F.2d 319, 327-328 (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987); *Mauldin* v. *Upjohn Co.*, 697 F.2d 644, 648 (5th Cir. 1983), *cert. denied*, 464 U.S. 848 (1983); and *United States* v. *Moore*, 732 F.2d 983, 989 (D.C. Cir. 1984).

**Conclusion.**

For the foregoing reasons the individual Selectmen and the Town of Hull respectfully urge the Court to grant a Writ of Certiorari to the Court of Appeals for the First Circuit.

Respectfully submitted,

MITCHELL J. SIKORA, JR.,*
VINCENT L. DiCIANNI,
FERRITER, SCOBBO, SIKORA,
CARUSO & RODOPHELE, P.C.
One Milk Street,
Boston, Massachusetts 02109.
(617) 423-0830

**Counsel of Record*
September 19, 1989

## Appendix Table of Contents.


Appendix A

Opinion of the Court of Appeals for the First Circuit reported at 878 F.2d 523 and conforming Judgment, entered June 21, 1989 1a

Appendix B

Appellants' Petition for Rehearing submitted July 5, 1989; and Order of Denial entered July 26, 1989 26a, 38a

Appendix C

District Court Judgment 39a

Appendix D

District Court Verdict 41a

Appendix E

Complaint 44a

Appendix F

Answer 55a

Appendix G

Stipulation of Facts 70a

Appendix H

Charges of Inefficiency and Neglect Against the Redevelopment Authority Members 75a

TABLE OF CONTENTS.

Appendix I

Documentary Evidence Relating to the First Amendment Claim 82a

Appendix J

Documentary Evidence Relating to the Question of Issue Preclusion 88a

Appendix K

Objection and Argument at Bench concerning the Exclusion from Evidence of the Selectmen's Written Findings, Conclusions, and Decision 91a

**Appendix A.**

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

---

No. 88-1969 878 F.2d 523

DAVID B. MILLER, ET AL.,
Plaintiffs, Appellees,

*v.*

TOWN OF HULL, MASSACHUSETTS, ETC., ET AL.,
Defendants, Appellants.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. David S. Nelson, U.S. District Judge]

---

Before
Campbell, Chief Judge,
Bownes, Circuit Judge
and Caffrey,* Senior District Judge.

---

Mitchell J. Sikora, Jr., with whom Vincent L. DiCianni and Ferriter, Scobbo, Sikora, Caruso & Rodophele, P.C., were on brief for appellants.

Harvey A. Schwartz with whom Dale C. Schneider and Schwartz, Shaw & Griffith were on brief for appellees.

---

June 21, 1989

---

*Of the District of Massachusetts, sitting by designation.

BOWNES, Circuit Judge. This civil rights case arises out a dispute between members of the Hull Redevelopment Authority (HRA) and members of the Hull Board of Selectmen (Board). Defendants-appellants, the Town of Hull and individual Board members — E. Reno Constantinides, the Chairman, Myron Klayman, Nancy Burns and Claudette Fitzsimmons[1] — appeal a jury's finding of liability and award of damages for plaintiffs-appellees, elected members of the HRA — David Miller, the Chairman, Nancy Dunn and Richard Musmeci.[2] For the reasons set forth below, we affirm.

## I. FACTS

Before reciting the facts that bear on this particular case, we describe the legislative framework for a redevelopment authority and the control a Board of Selectmen has over it. Under Massachusetts law, a "'Redevelopment authority', [is] a public body politic and corporate created pursuant to [Mass. Gen. L. ch. 121B, § 4]." Mass. Gen. L. ch. 121B, § 1. Chapter 121B deals differently with redevelopment authorities in towns as opposed to cities; because Hull is a town, we focus on redevelopment authorities in towns. Pursuant to § 4, the people of a town vote for the organization of a redevelopment authority. Dissolution also requires a vote by the people of the town *after* the redevelopment authority proposes dissolution. *Id.* There are five members on every redevelopment authority. § 5. In towns, four of the members are elected by the

[1] Louis Costa was the fifth member of the Board, but he was not named as a defendant.

[2] The other two members of the HRA were Frederick Alibrandi, an elected member and Robert Tong, the appointed member. Alibrandi was not a plaintiff. Tong was originally a plaintiff, but he was dismissed prior to trial at his own request.

public; one is appointed by the state department of community affairs (DCA). As an urban renewal agency, *see* § 9, a redevelopment authority has broad powers under § 11 and more specific ones under §§ 45-57. An elected member of a redevelopment authority may be removed by the Board of Selectmen for "inefficiency, neglect of duty or misconduct in office" subject to certain procedural safeguards including notice and a hearing. § 6.[3] The Board may also refer charges of the same to DCA with respect to the member appointed by that department. DCA may then remove the member subject to the same procedural safeguards. *Id.* During the pendency of charges, the people with the power to remove have the power to suspend temporarily. *Id.* During suspension, temporary members may be appointed by the people who suspended the members. *Id.* A vacancy created by an elected member before the end of a term is filled by the Board. § 5.

---

[3] This statute reads in pertinent part:

**Charges against members; hearing; removal; resignation; suspension**

The mayor or city council or board of selectmen . . . may, after hearing, remove any such member because of inefficiency, neglect or duty or misconduct in office provided that such member shall have been given, not less than fourteen days before the date set for such hearing, a copy in writing of the charges against him and written notice of the date and place of hearing to be held thereon, and at the hearing shall have been given the opportunity to be represented by counsel and to be heard in his defense. The mayor and city council or board of selectmen may also make or receive written charges against any member of a housing or redevelopment authority in such city or town appointed by the department and refer the same to the department which may proceed in the same manner as the mayor and city council or board of selectmen under the preceding sentence. Pending final action upon any such charges, the officer or officers having the power to remove such member may temporarily suspend him, provided that they shall immediately reinstate him in office if they find such charges have not been substantiated, and may appoint a person to perform the duties of such suspended member until he is reinstated or until he is removed and his successor is qualified.

"We begin by setting forth the relevant facts, mindful that we review the evidence and inferences fairly drawn therefrom in the light most favorable to the prevailing party." *Robinson* v. *Watts Detective Agency, Inc.*, 685 F.2d 729, 732 (1st Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). In 1961, the people of Hull voted to establish a redevelopment authority. In 1968, a 33 acre tract of land was slated for redevelopment in Hull. As a requirement of the United States Department of Housing and Urban Development (HUD), the HRA and the Board entered into a cooperation agreement. The agreement called for the town and all town departments to cooperate with the HRA in carrying out the redevelopment project. The agreement also called for the town to pay for 25% of the project in "cash or non-cash grants-in-aid." Most of the funds were to come from federal and state sources. The agreement could only be amended with the consent of HUD.

In 1978, the HRA entered into a contract with Consultants Inc. (Consultants) for the redevelopment of the entire 33 acre tract. Part of this contract called for the construction of a housing building for the elderly with 150 units. Over the next three years this contract was amended several times in ways not relevant to this case. In December 1981, an eighth amendment was added. In this amendment, Consultants agreed to give up its rights to develop the entire tract and to go forward with only the housing project for the elderly. HRA was thus free to negotiate with another developer for the balance of the tract. It knew of a developer, Joel Grae, who was interested in developing the rest of the tract.

The defendants had been consistently opposed to the housing project for the elderly for a variety of reasons. It would be inconsistent with a proposal for a gambling casino in another part of Hull. The inconsistency was that Hull was asking for permission from the state to allow a casino on the grounds of poverty. If a full-scale redevelopment plan was in progress, including the housing project for the elderly, such a claim

would be undercut. Furthermore, if the land was used for housing for the elderly, it could not be used for ancillary casino needs. A housing unit for the elderly would not be compatible with the proposed development of other areas in the redevelopment area. The developer, Joel Grae, wanted to build luxury condominiums on adjoining land; he contacted defendant, Constantinides, several times about the housing project for the elderly. Finally, the need for 150 units was questioned by the Board despite studies showing such a need for Hull residents.

The disagreement between HRA and the Board members on this issue led to a breakdown in relations between the two bodies. A letter, sent by Constantinides to Miller in August 1981, summarizes the problem:

> It is the position of the Board of Selectmen that, should the Redevelopment Authority negotiate the erection of subsidized Section Eight housing, by Consultants, Inc., on parcel 14A, the Board of Selectmen will take appropriate action to oppose them, as the Board of Selectmen does not favor such a plan.
>
> The Board finds that such a plan would be prejudicial and inimical to the proper development of the entire urban renewal area.

When the HRA refused to back down, the Board sponsored two articles for town vote. The first was to abolish the HRA. This article passed but no further action was taken to enforce it — possibly because it was not in conformity with Massachusetts law which requires that a housing authority must first propose dissolution before a town can vote to abolish it. Mass. Gen. L. ch. 121B, § 4. The second article called for a building height limit of 40 feet in the redevelopment area. Such a limit would have been the death knell for the project for the elderly.

This article also passed, but both HRA and HUD considered it unenforceable and a breach of the cooperation agreement. Consultants was informed of the unenforceability of this article.

The Board also created financial difficulties for the HRA. The Town of Hull had never paid any cash to HRA to meet its 25% obligation, rather it had provided non-cash support. All money from HUD was paid to the Town and the Board was supposed to authorize expenditures and payments when requested by the HRA. At the time that the housing for the elderly issue heated up, the Board became more chary in authorizing payments to the HRA. In early 1982, for instance, an audit revealed that the Board owed the HRA approximately $38,000. Rather than pay the sum, the Board dragged its heels and HRA was forced to bring a lawsuit for the money.

In early 1982, after it became clear from the last amendment to the Consultants contract that the housing for the elderly project would be built, the Board voted to reduce the project from 150 units to 75. If valid, this reduction would have made the project economically unfeasible. HRA and HUD took the position that this reduction was unenforceable and a breach of the cooperation agreement. Selectman Constantinides attended an HRA meeting in January 1982 and threatened retaliatory action if the HRA persisted with the project for the elderly.

Despite his misgivings about the project for the elderly, Joel Grae, the developer who wished to develop the rest of the 33 acre tract, continued to negotiate with HRA. Grae was concerned about the proximity of the project to an area on which he wanted to build luxury condominiums. By the end of February, 1982, a contract looked imminent and Grae was slated to give HRA $100,000 as a deposit by March 7. Consultants was also to give HRA $180,000 by April 1. These cash infusions would have made HRA financially independent from the Board.

Selectmen Burns and Constantinides attended an HRA meeting on February 26. At the meeting, Miller, of the HRA, announced that Consultants had published a request for bids on the housing project for the elderly and that construction was slated to begin by April 15.

On March 1, the Board voted to suspend all four elected members of HRA and to send charges to DCA along with the request for suspension with respect to Tong, the appointed member. The suspensions were based on identical charges against all five members. The Board appointed four temporary members whose views coincided with those of the Board. On March 2, an injunction was issued by a state court against the suspensions because of a violation of the notice requirements of Mass. Gen. L. ch. 121B, § 6.[4] After the injunction issued, Selectman Constantinides called Alibrandi of HRA and told him that if he would get certain documents for him out of the HRA files nothing further would happen. Alibrandi refused.

On March 3, HRA held an emergency meeting. Dunn, Miller, Musmeci and Alibrandi were present; Tong was out of town on business. After extending until June the time within which consultants had to pay HRA $180,000, the meeting turned to discussion of the suspensions. It was decided to adjourn to the town hall where the Board was meeting. Musmeci, who was suffering from a bad back, did not go.

At the joint meeting, Constantinides told the three HRA members that if they did not vote on the spot to abrogate the cooperation agreement and to take the town off the hook for all future expenses, they would be suspended again. On the advice of HRA's counsel, who was present, Miller and Dunn refused. Alibrandi agreed to do whatever he was asked to do.

---

[4] Although not clear from the record, we assume that the state court injunction nullified the appointment of the four temporary appointees.

The next day, Miller, Dunn and Musmeci were again suspended on the same charges; DCA was again requested to suspend Tong. Alibrandi was allowed to remain in office. The Board appointed three temporary members whose views were more attuned to those of the Board. The new HRA dropped the $38,000 lawsuit against the Board. It informed Consultants that the housing project for the elderly was discontinued. This resulted in a lawsuit by Consultants against HRA, its members and members of the Board. This case is currently pending in federal court. To date, the housing for the elderly has not been built.

In addition to the eleven original charges against the members of the HRA, six new ones were added on March 15.[5] All three members were charged in exactly the same manner; no attempt was made to individualize the charges or to tailor them to the time frames during which a specific plaintiff was actually a member of HRA. All charges alleged neglect and inefficiency under Mass. Gen. L. ch. 121B, § 6. Misconduct was not alleged.

The Board commenced hearings on the charges against Dunn, Musmeci and Miller on March 29, 1982.[6] After the third hearing, the three suspended members were no longer able to afford legal counsel. Miller and Musmeci resigned rather than proceed; Dunn continued without counsel. In March 1983, the three eligible Board members[7] voted to find that Dunn had committed 15 of the 17 charges. Burns and Fitzsimmons voted for her removal; Klayman voted against it. The

---

[5] The 17 charges involved a potpourri of issues, some dating back to the mid-1970s. The charges involved: financial irregularities; the filing of the $38,000 lawsuit against the Board; record keeping; the HRA's executive director; open meeting laws; and the housing project for the elderly.

[6] DCA refused to suspend Tong and did not remove him.

[7] Only Burns, Fitzsimmons and Klayman had been present at all the hearings and were eligible to vote. Costa had died, and Constantinides had not been re-elected to the Board.

Board's final conclusions were memorialized in a 95-page document.

In May 1983, Dunn ran for and was re-elected to HRA. Thereafter, the Board sent the same charges to the State Ethics Commission, the State Inspector General and HUD. No action was taken by any of those bodies.

In July 1983, plaintiffs brought suit in federal district court against defendants pursuant to 42 U.S.C. §§ 1983, 1985, the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § 11I, and Massachusetts common law. The § 1983 claims alleged violations of the first amendment and of both the procedural and substantive due process guarantees of the fourteenth amendment. The § 1985 claim alleged a conspiracy to remove plaintiffs from office; this count was dismissed at the close of plaintiffs' evidence because their offices were not federal. The Massachusetts Civil Rights claim alleged violations of both the federal and state constitutions. The state common law action was for the intentional infliction of emotional distress.

The district court denied defendants' motion for summary judgment. Defendants brought an interlocutory appeal. We dismissed the appeal because defendants did not assert a claim of qualified immunity in their summary judgment motion.

After a trial, the jury found for the plaintiffs and against all defendants. The jury awarded compensatory damages in the amounts of $47,400 to Dunn, $26,370 to Miller and $35,400 to Musmeci. The jury also awarded punitive damages in the amount of $43,700 to each plaintiff to be paid as follows: $42,100 by Burns, $41,400 by Constantinides, $42,100 by Fitzsimmons and $5,500 by Klayman. The jury answered the special interrogatories as follows:

1. Do you find that any of the defendants violated the rights of freedom of expression of the plaintiffs?

   Yes ___X___ No _____

2. Do you find that any of the defendants violated the rights of the plaintiffs to hold public office?

   Yes ___X___ No _____

2B. Do you find that any of the defendants violated the rights of the plaintiffs to fair procedures as a matter of due process of law?

   Yes ___X___ No _____

3A. Do you find that any of the defendants acted by threat, intimidation, or coercion so as to violate the rights of plaintiffs to hold public office as provided by the Massachusetts Constitution?

   Yes ___X___ No _____

3B. Do you find that any of the defendants acted by threat, intimidation, or coercion so as to violate the rights of the plaintiffs to hold office as provided by the United States Constitution?

   Yes ___X___ No _____

4. Do you find that the individual defendant Selectmen inflicted severe emotional distress on the plaintiffs as defined in my instructions to you without legal justification?

   Yes _____ No ___X___

5. Do you find that the defendant Selectmen acted with good faith and upon reasonable grounds in their suspension and subsequent removal proceeding against the plaintiffs?

Yes_____ No ___X___

The district court entered judgment in accordance with the jury verdict. It denied defendants' motion for a judgment n.o.v. and awarded plaintiffs' attorneys' fees and costs in the amount of $95,994.59. The defendants appeal on numerous grounds. We discuss only those issues necessary to our decision.

## II. EXCLUSION OF THE BOARD'S FINAL DECISION

At trial, the defendants sought to introduce the Board's 95-page final decision. This decision was rendered following the hearings the Board held with respect to the charges against Dunn. This document was excluded by the court pursuant to Fed. R. Evid. 403,[8] after it balanced the probative value of the document against the prejudicial and cumulative nature of the document. A trial court's determination under Rule 403 is reviewed only for abuse of discretion. *See United States* v. *Mateos-Sanchez*, 864 F.2d 232, 235-36 (1st Cir. 1988; *United States* v. *Beltran*, 761 F.2d 1, 11 (1st Cir. 1985); *United States* v. *Jarabek*, 726 F.2d 889, 903 (1st Cir. 1984). We find no such abuse here. The court carefully weighed the probity of

[8] Fed. R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

the evidence against its prejudicial and cumulative effects. It considered and rejected the efficacy of a limiting instruction. The defendants were allowed to put before the jury, via testimony, the information contained in the Board's final decision. Because the plaintiffs were not attacking the information itself, the court decided not to allow the document into evidence. It stated that if the plaintiffs were to make such an attack, it would allow the document to come into evidence. The district court did not abuse its discretion in excluding the Board's final written decision.

## III. DEFENDANTS' CREATIVE CREATIVE ENVIRONMENTS ARGUMENT

Defendants argue the plaintiffs "cannot state a § 1983 federal constitutional or statutory cause of action so long as the state administrative process and state courts were available to remedy the original wrong." Brief at 36. They rely on *Creative Environments, Inc.* v. *Estabrook*, 680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982), and its progeny. Such reliance is misplaced.

In *Creative Environments*, a developer claimed that a local planning board had violated his due process rights when it rejected his application for a zoning variance. We held: "Such a claim is too typical of the run of the mill dispute between a developer and a town planning agency . . . to rise to the level of a due process violation." *Id.* at 833. We did not hold that the availability of state administrative and court remedies barred such claims. We held that such claims, on the merits, do not state a due process violation. As we explained in a footnote:

> A different situation may be presented in some instances, particularly in the realm of equal protection, involving gross abuse of power, invidious discrimination, or fundamentally unfair procedures. For example, in *Moran* we cited *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), a case in which the Supreme Court found that a San Francisco building ordinance vesting unreviewable, arbitrary power in city officials was being enforced unconstitutionally so as to eliminate Chinese laundry operators. Different considerations may also be present where recognized fundamental constitutional rights are abridged by official action or state regulation. *See Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). But the ordinary state administrative proceeding involving land use or zoning does not present such a situation, regardless of how disappointed the license or privilege seeker may feel at being initially turned down.

*Id.* at 832 n.9; *see also Chiplin Enterprises, Inc.* v. *City of Lebanon*, 712 F.2d 1524, 1527-28 (1st Cir. 1983). In cases relying on *Creative Environments*, we have found that the plaintiffs failed to state a due process claim. *See Quinn* v. *Bryson*, 739 F.2d 8, 9-10 (1st Cir. 1984); *Cloutier* v. *Town of Epping*, 714 F.2d 1184, 1189-90 (1st Cir. 1983); *Roy* v. *City of Augusta, Maine*, 712 F.2d 1517, 1523 (1st Cir. 1983); *Chiplin Enterprises*, 712 F.2d at 1527; *cf. Raskiewicz* v. *Town of New Boston*, 754 F.2d 38, 44-45 (1st Cir.), *cert. denied*, 474 U.S. 845 (1985). These cases are distinguishable from the present case on the ground that they involved refusals by local boards to grant licenses or zoning variances. Moreover, it is firmly settled that exhaustion or resort to state remedies is *not* a prerequisite to a § 1983 claim. *See Patsy* v. *Board of*

*Regents*, 457 U.S. 496 (1982); *Urbanizadora Versalles, Inc.* v. *Rivera Rios*, 701 F.2d 993, 998-99 (1st Cir. 1983) (applying *Patsy* to zoning cases).

*Creative Environments* and its progeny apply to certain due process claims. They do not (1) require exhaustion of state remedies or (2) apply to the deprivation of such fundamental constitutional rights as those protected by the first amendment. Since we affirm in section V, *infra*, the finding that plaintiffs' first amendment rights were violated, we need not decide what, if any, application *Creative Environments* has with respect to plaintiffs' due process or state law claims.[9]

## IV. STANDARD FOR REMOVAL

Defendants suspended plaintiffs from their elected positions on the HRA. Defendants alleged inefficiency and neglect of duty, but not misconduct, as the grounds for plaintiffs' removal. They purportedly relied on Mass. Gen. L. ch. 121B, § 6, which states in pertinent part: "The . . . board of selectmen . . . may, after hearing, remove any such member because of inefficiency, neglect of duty or misconduct in office . . . . Pending final action upon any such charges, the officer or

[9] Defendants urge us to hold that in at least Dunn's case, and perhaps in all plaintiffs' cases, the claims are barred by principles of collateral estoppel. The collateral estoppel is said to derive from one of two sources: (1) the plaintiffs' claims could have been raised by plaintiffs in state court proceedings, *if* the plaintiffs had appealed the Board's final decision, or (2) the plaintiffs could have raised their claims before the Board itself. The first argument is merely another way of stating that plaintiffs should have exhausted their state remedies by appealing through the state courts and raising the issue there — a requirement of exhaustion which has been rejected by the United States Supreme Court. The second argument fails because plaintiffs' constitutional claims were at best tangential to removal proceedings; the Board's sole duty was to determine the validity of the charges against the plaintiffs.

officers having the power to remove such member may temporarily suspend him." In instructing the jury as to the standard for removal under the statute, the trial judge stated:

> The grounds established by the Massachusetts law for removal of a redevelopment authority member are inefficiency and neglect of duty. The alleged neglect of duty or inefficiency sufficient to warrant the removal must be significant rather than insubstantial or trivial. The rule violated must be of importance to the administration of the office and must be so important that a public officer violating it becomes unfit for . . . his or her office. This does not mean that a board member can be removed merely for errors of judgment or failure to follow good public policy practices. In order to find neglect of duty or inefficiency warranting removal, the defendants must show that the plaintiff violated a known and well established standard of conduct. The emphasis is in the necessity to establish that a known standard of conduct was violated. The duty violated must have been known or should have been known to the officers who allegedly violated it.

The court referred back to this instruction in delineating the plaintiffs' constitutional claims; it also repeated essentially the same instruction in response to a jury question during deliberation. The defendants objected to the court's equating "inefficiency and neglect of duty" with conduct which makes a person unfit for office. Defendants contend that such an instruction was tantamount to a directed verdict on this issue since three

of the four individual defendants[10] testified that the plaintiffs were not unfit for office.[11]

The Massachusetts Supreme Judicial Court has held:

> In the operation of [Mass. Gen. L. ch. 121B, § 6], which predicates removal upon the proof of misconduct in office, it is sufficient to prove that the public officer has become unfit for office by reason of his intentional violation of a known and significant rule or duty inherent in the obligations of his office.[1]

*Bunte* v. *Mayor of Boston*, 278 N.E.2d 709, 712 (Mass. 1972). In the footnote, the court stated:

> 1. We do not intend to attach a narrow meaning to our use of the words "rule" and "duty." For example, we do not intend to exclude consideration of intentional violations of statutes, regulations, or ordinances. The emphasis here is in the necessity to establish that a known standard of conduct was violated. Otherwise, the words "misconduct in office" become impermissibly vague, and the risk arises that an office holder will suffer the stigma of removal for "misconduct in office" which was no more than an error of judgment.

*Id.* n.1. The court explained its standard as follows:

---

[10] Burns, Fitzsimmons and Klayman so testified; Constantinides was not asked this question.

[11] We note that defendants' requested instructions included all other aspects of the district court's instruction. In supplemental instructions, they requested instructions which would have equated neglect of duty and inefficiency with common law negligence.

> Necessarily, the misconduct sufficient for removal from office must be significant, rather than unsubstantial or trivial. The rules or duties violated must be of importance in the administration of the public office. Otherwise stated, the rule or duty must be important enough so that its breach renders the officer unfit to continue to hold office.

*Id.* at 713; *see also id.* at 714 ("errors of judgment" cannot be construed as misconduct in office") (citing *Belinfante* v. *Mayor of Revere*, 227 N.E.2d 502, 506 (Mass. 1967)).

We recognize that *Bunte* dealt only with allegations of "misconduct," and that *Belinfante*, though dealing with neglect of duty and inefficiency, did not define those terms. Three considerations constrain us not to disturb the district court's interpretation of local law. First, adoption of the defendants' definition that neglect of duty and inefficiency are the same as common law negligence would conflict with the teaching of the Supreme Judicial Court that even in cases of neglect and inefficiency, errors in judgment are now sufficient for removal. *Belinfante*, 227 N.E.2d at 506. Removal of an official for common law negligence is, by definition, removal for an error in judgment. Second, removal of an elected official for less than a serious breach of duty would deprive the electorate of its choice of a representative whenever a majority of the Board of Selectmen disagreed with the HRA's handling of a matter."[12] Finally, we accord "much deference . . . to a district court's construction of the law of the locality in which it sits." *Garcia* v. *Friesecke*, 597 F.2d 284, 295 (1st Cir.), *cert. denied*, 444 U.S. 940 (1979); *see also Rose* v. *Nashua Bd. of Educ.*, 679 F.2d 279, 281 (1st Cir. 1982) (collecting cases).

---

[12] Both *Bunte* and *Belinfante* involved situations where the housing officials were appointed by the mayor, *not* elected. If anything, the fact that plaintiffs were elected in the present case counsels for a higher removal standard than the one established in the previous Massachusetts case.

Defendants argue that using the same standard for all three statutory grounds of "inefficiency, neglect of duty or misconduct" for removal renders the disjunctive wording superfluous or redundant. This argument, however, misses the import of the SJC's basic proposition that "[i]t is not the cause alleged which determines the appropriate standard, but rather the statutory provision." *McSweeney* v. *Town Manager of Lexington*, 401 N.E.2d 113, 116 (Mass. 1980) (footnote omitted). The Massachusetts Supreme Judicial Court has determined that under the statute a high standard must be met before removal is appropriate, and the district court so instructed the jury. The instruction was not erroneous.

## V. FIRST AMENDMENT VIOLATION

Although we have found no cases directly on point, probably because it is considered unassailable, we have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment. This is especially true when the agency members are elected officials. There can be no more definite expression of opinion than by voting on a controversial public issue.[13]

---

[13] Defendants have cited no cases to the contrary. To be sure, public officials in politically relevant positions may sometimes be properly removed from office because of their political affiliation, and because of the political views they express, without running afoul of the First Amendment. *See Jimenez-Fuentes* v. *Torres-Gaztambide*, 807 F.2d 236 (1st Cir. 1986) (en banc), *cert. denied*, 107 S.Ct 1888 (1987). *See generally Branti* v. *Finkel*, 445 U.S. 507 (1980); *Elrod* v. *Burns*, 427 U.S. 347 (1976). In addition, discharging a government employee because of his speech on matters of personal interest, or because of speech that disrupts his agency's work, does not necessarily violate the First Amendment. *See Connick* v. *Myers*, 461 U.S. 138 (1983). But these situations are remote from the one presented in this case. When it

We have found some cases that are helpful by analogy. In *Bond* v. *Floyd*, 385 U.S. 116 (1966), Bond brought suit when the Georgia House of Representatives refused to seat him after he was duly elected because of statements he made concerning the war in Vietnam. The state argued that it was "constitutionally justified in exacting a higher standard of *loyalty* from its legislators than from its citizens." *Id.* at 135 (emphasis in original). The Court responded that, while an oath of office may be required, "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Id.* at 135-36. The Court rejected a differing first amendment standard for publicly-elected officials:

> The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators have an obligation to take positions on controversial political questions so that the constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.

*Id.* at 136-37; *see also Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government"). The "obligation to take positions" necessarily includes the right to

---

is clear, as here, that political expression is not a legal or otherwise appropriate basis for defendants to have suspended or dismissed the public officials in question, then such a retaliatory suspension or dismissal violates the official's First Amendment rights. The Board of Selectmen's removal powers here were plainly not exercisable under Massachusetts law simply on the basis of defendants' agreement or disagreement with plaintiffs' position and views on matters of town policy.

vote freely on issues as they arise. *See Clarke* v. *United States*, 705 F. Supp. 605, 612 (D.D.C. 1988). The right to vote freely enables legislators "to consummate their duty to their constituents." *Id.* And, as *Bond* makes clear, this right derives from the first amendment, which protects the official statements of legislators. *See also Wrzeski* v. *City of Madison, Wisconsin*, 558 F. Supp. 664 (W.D. Wisc. 1983) (entering preliminary injunction against city ordinance which compelled council members to vote "aye" or "no" based on improper infringement of members first amendment right to refrain from voting).[14]

In *Rankin* v. *McPherson*, 483 U.S. 378 (1987), the Court pointed out: "It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech. *Perry* v. *Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697-98, 33 L.Ed.2d 570 (1972)" *Id.* at 2896. Surely, elected members of a public agency may not be removed from office for voting

---

[14] The only case we have found upholding a limitation on an elected official's right to vote freely is inapposite to the present case. In *United States* v. *City of Yonkers*, 856 F.2d 444 (2d Cir. 1988), *cert. denied in part*, 109 S.Ct. 1337, *cert. denied*, 109 S.Ct. 1339 (1989), the city entered into a consent judgment in federal court, part of which required the Council to enact certain remedies. The court upheld contempt citations after the Council refused to vote as per the consent judgment. In addressing the council members' first amendment claims, the court stated:

> Even if we acknowledge that the act of voting has sufficient expressive content to be accorded some First Amendment protection as symbolic speech, the public interest in obtaining compliance with federal court judgments that remedy constitutional violations unquestionably justifies whatever burden on expression has occurred. The council members remain free to express their views on all aspects of housing in Yonkers. But just as the First Amendment would not permit them to incite violation of federal law, it does not permit them to take action in violation of such law.

*Id.* at 457 (citations omitted). This case obviously does not apply to the situation before us.

contrary to the wishes of the Board of Selectmen. We turn now to determine the reasons for the suspension of plaintiffs from the Board.

The entire course of conduct by the defendants supports the conclusion that the plaintiffs were suspended because of the position they took as HRA members with respect to the housing project for the elderly. Defendants had harassed the HRA by threats of abolition and the actual withholding of funds. The Board sponsored ordinances which if enforceable would have effectively halted the housing project. Defendants even sought the removal of Tong, the appointed member, from HRA by sending charges to the DCA. The only member against whom charges were not lodged was the member who stated he would go along with the selectmen's wishes. And the Board, after removing the HRA members who disagreed with it, appointed temporary members who did its bidding. The evidence supports the jury finding that plaintiffs were removed for speaking out and voting for a project to which the Board was opposed. This was a violation of their first amendment rights. It was also a violation of the Massachusetts Civil Rights Act. We, therefore, need not discuss the other claims made by plaintiffs.

## VI. QUALIFIED IMMUNITY

The defendants argue that they are entitled to qualified immunity because the law was not clearly established at the time of their actions. In the most recent case on qualified immunity, the Court has counselled:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that

> an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent.

*Anderson* v. *Creighton*, 107 S.Ct. 3034, 3039 (1987) (citations omitted).

We find that in the light of pre-existing law, the unlawfulness of removing plaintiffs from their positions on the HRA should have been apparent to defendants. In *Bond*, 385 U.S. 116, the Supreme Court specifically rejected the argument that elected officials have lesser first amendment rights than ordinary citizens. At the time the removals were effected, there was firmly embedded in our constitutional fabric the principle that government employees could not be discharged for reasons that infringed on the employee's right of freedom of speech. *See Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). Given this, a reasonable public official could not have failed to recognize that elected officials cannot be discharged for taking political positions of their choice.

The defendants contend that the plaintiffs' failure to prove malicious intent or bad faith entitles defendants to qualified immunity. Even assuming subjective good faith has any relevance after *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), defendants' contention fails for two reasons — one legal, one factual. As a legal matter, a defendant is not entitled to qualified immunity if (1) it was clearly established that the defendant's actions would be a violation of the plaintiff's rights *or* (2) he acted in bad faith. *See Wood* v. *Strickland*, 420 U.S. 308, 322 (1975). A finding that the law was clearly established renders an inquiry into good faith irrelevant. In addition, the jury specifically found that the defendants did not act in good faith. There was more than sufficient evidence to support this finding.

A reasonable member of the Board of Selectmen would have understood that removal of the members of the HRA for voting as they did, was an egregious violation of plaintiffs' first amendment right. Plaintiffs had a duty to vote on the controversial issue of housing for the elderly. The exercise of this duty was clearly protected by the first amendment. There is no basis for defendant's claim of qualified immunity.

## VII. PUNITIVE DAMAGES

Based on a claim that they acted in good faith, defendants argue that punitive damages were inappropriate. The Supreme Court has held:

> that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

*Smith* v. *Wade*, 461 U.S. 30, 56 (1983); *see also Maldonado Santiago* v. *Velazquez Garcia*, 821 F.2d 822, 829 n.7 (1st Cir. 1987) (quoting *Smith*). The trial court instructed the jury along the lines of *Smith*. Defendants do not contest the judge's instruction on this issue; rather, they attack the appropriateness of punitive damages given the facts of this case. The jury, in answering special interrogatories, found that defendants did not act in good faith but rather "acted by threat, intimidation, or coercion" to deprive plaintiffs of their rights. Such findings are amply supported in the record, and provide a basis for finding that defendants acted with reckless or callous indifference for plaintiffs' rights or with an evil motive or intent. *See*

*Kercado-Melendez* v. *Aponte-Roque*, 829 F.2d 255, 267 (1st Cir. 1987) (upholding punitive damages where "[t]he [defendant's] conduct, as found by the district court, demonstrated a steadfast intent to discharge [plaintiff], irrespective of her constitutional rights or the actual merits of the charges brought against her."), *cert. denied*, 108 S.Ct. 2037 (1988). The award of punitive damages in this case was appropriate.[15]

## CONCLUSION

The defendants used their power to remove plaintiffs in an attempt to create a compliant redevelopment authority. In doing so, the defendants violated the plaintiffs' first amendment rights. The unlawfulness of their actions should have been apparent to them. The judgment appealed from is

*Affirmed.*

[15] Defendants have not contested the amount of damages awarded by the jury.

# United States Court of Appeals
## FOR THE FIRST CIRCUIT

No. 88-1969

DAVID B. MILLER, ET AL.,
PLAINTIFFS, APPELLEES,

*v.*

TOWN OF HULL, MASSACHUSETTS,
ETC., ET AL.,
DEFENDANTS, APPELLANTS.

## JUDGMENT

Entered June 21, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano

*Clerk.*

**Appendix B.**

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

---

No. 88-1969.

DAVID B. MILLER, ET AL.,
Plaintiffs, Appellees,

*v.*

TOWN OF HULL, MASSACHUSETTS ET AL.,
Defendants, Appellants.

---

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

---

**Appellants' Petition for Rehearing Pursuant to FRAP 40(a).**

---

MITCHELL J. SIKORA, JR.,
VINCENT L. DICIANNI,
FERRITER, SCOBBO, SIKORA,
CARUSO & RODOPHELE, P.C.,
One Milk Street,
Boston, Massachusetts 02109.
(617) 423-0830

July 5, 1989.

## Table of Contents.

Petition [28a]

Argument [28a])

I. The Opinion Of The Court Does Not Apprehend The Argument Of Issue Preclusion. It Does Not Address The Reasoning Or The Authorities Presented By The Selectmen [28a]

II. The Court's Version Of The Evidence And Of Permissible Inferences And Findings By The Jury Systematically Excludes In Toto All Countervailing Evidence Favorable To The Selectmen. This Treatment Violates The Standard For Decision And Review Of Directed Verdict And JNOV Decisions. [32a]

Conclusion [37a]

PETITION.

In accordance with FRAP 40, the appellant town and selectmen (hereinafter "the selectmen") petition the court for rehearing of its original decision and reasoning upon the following grounds and without waiver of any previously asserted argument.

1. The decision and reasoning of the court do not meet the appellants' argument that the doctrine of issue preclusion bars the present § 1983 action.

2. The court's analysis of the sufficiency of the evidence for review of the rulings against motions for directed verdicts and JNOV excludes consideration in toto of the evidence and the multiple undisputed facts detracting from the plaintiffs' claims and supporting use of the statutory-and-removal process by the town and selectmen.

## I. THE DECISION AND REASONING OF THE COURT DO NOT MEET THE SELECTMEN'S ARGUMENT THAT THE DOCTRINE OF ISSUE PRECLUSION BARS THE PRESENT § 1983 ACTION.

In their original Brief (pp. 39-41) and Reply Brief (pp. 15-17), the selectmen argued that the doctrine of issue preclusion bars the plaintiffs' § 1983 damages action. They pointed out that *Allen* v. *McCurry*, 440 U.S. 90 (1980) precludes the assertion in § 1983 damages actions in federal district court of constitutional claims raised or capable of being raised in state proceedings; that this court has followed that rule, *Landrigan* v. *City of Warwick*, 628 F.2d 736, 740 (1st Cir. 1980) (preclusion of "issues that were or might have been raised in

the former lawsuit"); *Sylvander* v. *New England Home for Little Wanderers*, 584 F.2d 1103, 1108-1109 (1st Cir. 1978); *Griffin* v. *Burns*, 570 F.2d 1065, 1070-1071 (1st Cir. 1978); and *Lovely* v. *Laliberte*, 498 F.2d 1261, 1262-1264 (cases collected) (1st Cir.), *cert. denied* 419 U.S. 1038 (1974); see also *General Foods Corp.* v. *Massachusetts Department of Public Health*, 648 F.2d 784, 786-787 (1st Cir. 1981); that Massachusetts has adopted the doctrine of administrative res judicata making final the adjudication of issues by state and local agencies which litigants then failed to pursue by the prescribed route of review to the state courts, *Almeida* v. *Travelers Ins. Co.*, 383 Mass. 226, 229-231; 418 N.E.2d 602, 605 (1985); and that the plaintiffs here could have litigated their claim fully in the state system by completion of the municipal hearings pursuant to M.G.L. c. 121B, § 6, and by the prescribed certiorari appeal to the Superior Court pursuant to M.G.L. c. 249, § 4, and further appeal as necessary. Their pursuit of a different remedy (compensatory damages instead of reinstatement) did not alter the identity of the underlying claim. *Allen* v. *McCurry*, 449 U.S. 90, 104-105 (1980); *Roy* v. *City of Augusta*, 712 F.2d 1517, 1523 (1st Cir. 1983). Nor did any rule prevent them from combining a damages action with the certiorari claim in the Superior Court as a matter of civil rights allegations, *Maine* v. *Thiboutot*, 448 U.S. 1, 2-3 (1980); *Rzeznik* v. *Chief of Police of Southampton*, 374 Mass. 475, 484-486; 373 N.E.2d 1128, 1133-1134 (1978); or as a matter of Massachusetts tort doctrine, *Gildea* v. *Ellishar*, 363 Mass. 800, 820; 298 N.E.2d 847, 585-859 (1973).

The court responded to this argument by means of a footnote (n.9 at slip opinion 17) to the effect (1) that the contention was simply the assertion that the plaintiffs should have exhausted their administrative remedies as a prerequisite for a § 1983 claim in the federal district court, a proposition rejected by *Patsy* v. *Board of Regents of the State of Florida*,

457 U.S. 496 (1982) (uncited); and (2) that the presentation of constitutional defenses or claims in the state proceedings was merely "tangential" to the statutory objective to determine whether the redevelopment authority members had acted with inefficiency or neglect of duty. Neither of these responses meets the point of issue preclusion.

An important and practical distinction separates the operation of excusal from exhaustion (*Patsy*) from the operation of issue preclusion (*Allen*). Excusal from exhaustion might entitle a § 1983 damages claimant to bypass state administrative and judicial process completely and to proceed *ab initio* to the federal district court with his complaint. It does not entitle him to the dual strategy to undertake the state law process to sample the probability of success, to break off from that process during or at the conclusion of the administrative or judicial proceeding, and then to begin again in the federal district court with the same claim colored as a § 1983 lawsuit. The plaintiffs here employed that expedient strategy.

As *Allen* and *Almeida* emphasize, that strategy attempts to achieve two adjudications instead of the one full one to which a litigant is entitled. The operation of issue preclusion eliminates the "cost and vexation" of multiple lawsuits, conserves judicial resources, prevents inconsistent decisions, and encourages reliance on adjudication. *Allen* at 94. Federal court respect for state administrative and judicial process serves the further purposes of comity and the congressional mandate of full faith and credit for state adjudications deemed final. *Allen* at 95-96. 28 U.S.C. § 1738. In Massachusetts a litigant cannot engage in an administrative adjudication, accept an adverse result, ignore his prescribed judicial remedy, and then commence relitigation. *Almeida*, 383 Mass. at 230-231; 418 N.E.2d at 605. The adverse result is final. *Id.* The federal district court is precluded from its relitigation. *Allen* at 95-96. 28 U.S. § 1738.

As a practical matter, the allowance of such relitigation renders the federal district court and its juries as a forum for *de novo* review of the infinite variety of imaginable constitutional allegations by disappointed litigants seeking vindication against state administrative and judicial results. This case is a monument to the duplication and waste designed to be prevented by *Allen*: 19 sessions and 80 hours of administrative hearings; a 96-page decision; the omission of state court review; and complete relitigation of the same factual issues by a 22-day jury trial in the federal district court. Under *Allen, Patsy*, and *Almeida*, the plaintiffs could pursue one process or the other; but not both.

The court's second rejoinder — that the plaintiffs' claim of bad faith violation of their First Amendment right to vote on public policy matters was "tangential" to the state law process — is simply fallacious. The contention of a pretextual suspension-and-removal process was the core of their response to the selectmen. They were free and capable to assert and to prove it at the municipal proceedings, in the Superior Court, and in the state appellate courts in the manner of any affirmative defense.[1]

For the foregoing reasons we respectfully request the court to address the argument of issue preclusion and to address specifically the application of the *Allen* and *Almeida* decisions to this case.

---

[1] As the Supreme Court observed in *Allen* at 105:

> The only other conceivable basis for finding a universal right to litigate a federal claim in a federal district couirt is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues.

## II. THE COURT'S VERSION OF THE EVIDENCE AND OF PERMISSIBLE INFERENCES AND FINDINGS OF THE JURY SYSTEMATICALLY EXCLUDES IN TOTO COUNTERVAILING EVIDENCE FAVORABLE TO THE SELECTMEN. THAT TREATMENT VIOLATES THE STANDARD FOR DECISION AND REVIEW OF DIRECTED VERDICT AND JNOV RULINGS.

The court's portrayal of the evidence and permissible findings is extraordinary (slip opinion at 4-11; 25). It begins with the proposition that "we review the evidence and inferences fairly drawn therefrom in the light most favorable to the prevailing party" (citing *Robinson* v. *Watts Detective Agency, Inc.*, 685 F.2d 729, 732 (1st Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983) (slip opinion at 4). It concludes with the factual assertion that "[t]he entire course of conduct by the defendants supports the conclusion that the plaintiffs were suspended because of the position they took as HRA members with respect to the housing project for the elderly" (slip opinion at 25).

The more complete statement of the rule in this circuit and generally is that "[w]e examine the facts in the light most favorable to plaintiff, *but without neglecting the uncontradicted evidence introduced by the defendant.*" *Carlson* v. *American Safety Equipment Corp.*, 582 F.2d 384, 385 (1st Cir. 1976); *Molinar* v. *Western Electric Company*, 525 F.2d 521, 523 (1st Cir. 1975) (authorities collected) (emphasis supplied). See also *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249-252 (1986) (discussion of the directed verdict standard). The exercise is to be conducted with two eyes open, not one. The standard does not authorize the trial or appellate court to turn a blind eye to undisputed facts and probative evidence conflicting with the findings at issue.

The factual recital of the present opinion marks a pronounced deviation from that duty. One searches the present opinion in

vain for reference to a scintilla of evidence favoring the selectmen in the course of a 22-day trial. The opinion excludes certain bodies of evidence bearing upon material facts. It misstates other categories of evidence and purported facts. In particular, much of the evidence and fact omitted were documented, uncontroverted events entirely free of testimonial conflict.

A. *Facts and Evidence Omitted.*

1. The HRA members' public cancellation of the entire urban renewal contract with the developer Consultants, Inc., on July 1, 1981, for massive nonperformance after two years and 10 months (RA 114; 2542-2543, 2624).

2. The HRA members' unexplained turnabout and introduction of a new contract with the terminated developer in January, 1981, to build an elderly housing tower on the renewal tract (RA 2482-2891; 2490; 2634).

3. The ongoing failure of the HRA members to produce the statutorily mandated annual financial reports to the selectmen, state auditor, and state department of community affairs. M.G.L. c. 121B, § 52, first paragraph (RA 585-586).

4. The HUD-required audit of the HRA's financial performance for the period 1976 through 1980 prepared and released by a private firm in July 1981, criticizing multiple HRA practices, and observing that the Town was accountable to HUD for $337,000 in HRA-incurred notes and for $1,077,577 (25%) in HRA project costs (RA 2608-2609; 2095).

5. HUD's announced position that it regarded the town as an obligor for all HUD notes in the eventuality of HRA bankruptcy or project failure (RA 1393, 1395, 1396-1397) (RA 1545; 1748-1750; 2105).

6. The refusal of the HRA in December, 1981, to refrain from overdrafts upon project funds transmitted through municipal accounts (RA 2498· 2503; including the "NUTS" letter from Chairman Miller).

7. The refusal by the HRA members in February, 1982, of the selectmen's requests to meet with the selectmen and HUD officers to discuss the financial relationship between the bodies (RA 2512; 2100).

8. The HRA members' acknowledgement at the February 26, 1982, meeting that the agency was now "broke" (RA 2166; 2194); their simultaneous rejection of the selectmen's request for a cooperative meeting with the selectmen and HUD concerning finances, despite member Alibrandi's objections; and Chairman Miller's proposal that the HRA now operate over budget (RA 2207).

9. The full range and time commitment of the selectmen's ongoing general duties, and the scope of the suspension-and-removal hearings (13 months, 17 charges, 19 sessions, 17 witnesses, 2,000 exhibits) (after two of the HRA members had resigned and after Mrs. Dunn had proposed a summary decision of her case at the completion of the fourth hearing) (and after the supposedly compliant successor HRA was in place) all allegedly as a massive pretext to eliminate the HRA members as the result of a dispute over the principle of elderly housing (RA 1592; 1776-1777; 1779-1780).

10. The selectmen's consultation with town counsel in the preparation of all charges, conduct of all hearings, and rendition of a final decision (RA 1497-1498; 1507-1508; 1995-1997).

In short, the court excludes from consideration *all* the evidence in the case tending to show the selectmen's continuing, rational, good faith concerns over the central issue of its relationship with the HRA; the town's financial exposure resulting from the HRA's 13-year inability to accomplish the renewal plan.

2. *Facts and Evidence Misstated.*

1. That the HRA merely executed an "eighth amendment" to the contract with the developer in December, 1981 (slip opinion at 5) when, in fact, it was inexplicably changing its field to resurrect the discredited contractor six months after termination.

2. The persistent representation that the selectmen opposed an elderly housing "project" and the concept of elderly housing (slip opinion at 5-6, 25) in the town, when the evidence shows without exception that they opposed only an 11-story high-rise tower on renewal parcel 14A because of its location in a flood plain and the questionable safety of evacuating elderly tenants from the upper floors in times of emergency (see especially the Constantinides letter of August, 1981, cited by the court itself as evidence of ill will, slip opinion at 8, but stating precisely that the selectmen opposed the location of the building "*on parcel 14A*" [emphasis supplied] of the renewal tract).

3. The representation that the selectmen wished to defeat the construction of an elderly housing structure because it might thwart state legislative approval of a hotel gambling casino facility in town as an alternate engine of economic revival (slip opinion at 5-6), when (1) no plaintiff could explain how a single parcel building of subsidized housing could so enrich a community as to forfeit legislative support for economic assistance; (2) the selectmen never took a position of any kind concerning the introduction of a casino; and (3) the plaintiffs themselves on the stand acknowledged the allegations as conjecture (Dunn, RA 603; Miller, RA 681, 878, 892-893; Musmeci, RA 989, 1003-1004). Of all the concoctions introduced into this case, the casino hypothesis remains the most gulling and absurd (slip opinion at 5-6).

4. The representation that the selectmen attempted to abolish the HRA (slip opinion at 6) by town article, along with

the suggestion that the exclusively proper legal method was a town vote for dissolution after the authority itself proposed dissolution (slip opinion at 2-3, citing M.G.L. c. 121B, § 4). A conscientious reading of the town meeting article (RA 124; 2594) shows that it proposed to petition special legislation authorizing a binding town referendum upon the continuances of the HRA. This process is hardly the death stroke of a unilateral abolition. Petitions to state legislatures, enactments by state legislatures, and referenda votes by citizens upon local matters of importance generally qualify as democratic processes enjoying constitutional protection from such sources as the First Amendment. It is difficult to understand why the court views them as so beneficent on behalf of the HRA (slip opinion at 21-25), and as so sinister on the part of a popularly elected and directly accountable group of selectmen (*id.* at 25).

5. The representation that the selectmen "created financial difficulties for the HRA" (slip opinion at 7) allegedly by furnishing non-cash support to meet its immediate 25% obligation and by withholding an after-discovered obligation of $38,000 (*id.*). It is undisputed that the cooperation agreement expressly authorized the town to furnish its 25% in alternate values of "non-cash grants-in-aid" (slip opinion itself at 5); and that the HRA sued the selectmen for the $38,000 before the selectmen could even submit the legally necessary request for the funds to the Town Meeting (RA 1577-1579; 1771; 1854-1856; 2120).

6. The court recites that in "early 1982 . . . it became clear from the last amendment to the consultants contract that the housing for the elderly project would be built . . ." (slip opinion at 7). Consultants never approached satisfaction of the necessary financial bonding and governmental permits to begin construction (RA 384-391). Construction was never imminent or "clear" so as to galvanize alleged retaliation by the selectmen. The HRA's proposal to publish bid invitations at the end of February (slip opinion at 8) shows the remoteness of construction.

This pattern of selective evidentiary backfilling is completely misleading. Taken at face value, it would cause one to wonder why the trial required 19 days and why the jury needed three days of deliberation and supplemental instructions to detect the unremitting course of official misconduct rehearsed by the court. This one-dimensional plot bears little connection to the totality of the evidence and no connection to the reality of the events in litigation.

## CONCLUSION.

For either or both of the foregoing reasons, the court should reconsider the reasoning and result of its initial opinion, should vacate the present judgment, and should enter final judgment in favor of the defendant town and individual selectmen.

Respectfully submitted,

MITCHELL J. SIKORA, JR.,
VINCENT L. DiCIANNI,
FERRITER, SCOBBO, SIKORA,
CARUSO & RODOPHELE, P.C.,
One Milk Street,
Boston, Massachusetts 02109.
(617) 423-0830

Dated: 7-3-89.

Counsel for the Appellants.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1969.

DAVID B. MILLER, ET AL.,
Plaintiffs, Appellees,

*v.*

TOWN OF HULL, MASSACHUSETTS, ETC., ET AL.,
Defendants, Appellants.

**Before**

Campbell, *Chief Judge*,
Bownes, *Circuit Judge*,
and Caffrey, **Senior District Judge*.

**ORDER OF COURT**

Entered July 26, 1989

Upon consideration of appellant's petition for rehearing;
It is ordered that said petition be and the same hereby is denied.

By the Court

FRANCIS P. SCIGLIANO

_____

Clerk

## Appendix C.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| DAVID B. MILLER, | ) | |
| NANCY E. DUNN, | ) | |
| RICHARD A. MUSMECI, and | ) | |
| ROBERT M. TONG, | ) | |
| Plaintiffs, | ) | CIVIL ACTION |
| v. | ) | No. 83-2119-N. |
| TOWN OF HULL, MASSACHUSETTS, | ) | |
| a Municipal Corporation, and | ) | |
| E. RENO CONSTANTINEDES, [*sic*] | ) | |
| NANCY BURNS, CLAUDETTE FITZ- | ) | |
| SIMMONS, and MYRON KLAYMAN, | ) | |
| Individually and in Their | ) | |
| Official Capacities, | ) | |
| Defendants. | ) | |

FINAL JUDGMENT.

JUDGMENT.

In accordance with the entries upon the Verdict Slip rendered by the jury at the conclusion of trial, the court hereby enters final judgment as follows.

1. Compensatory Damages against the defendants Town of Hull, Nancy Burns, Claudette Fitzsimmons, Myron Klayman, and E. Reno Constantinedes [*sic*], jointly and severally, and in favor of the plaintiffs in the following amounts:

| | |
|---|---|
| (a) Nancy Dunn | $47,000 |
| (b) David Miller | $26,370 |
| (c) Richard Musmeci | $35,400 |

2. Punitive Damages in favor of the plaintiffs, respectively, in the following amounts:

| | |
|---|---|
| (a) Nancy Dunn | $43,700; |
| (b) David Miller | $43,700; and |
| (c) Richard Musmeci | $43,700; |

and against the defendants, respectively, in the following amounts:

| | |
|---|---|
| (a) Nancy Burns | $42,100; |
| (b) E. Reno Constantinedes [*sic*] | $41,400; |
| (c) Claudette Fitzsimmons | $42,100; and |
| (d) Myron Klayman | $ 5,500. |

/s/ David S. Nelson, J.
United States District Court

Dated: March 16, 1988.
(Joint submission of parties)

**Appendix D.**

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| DAVID MILLER, NANCY DUNN, and RICHARD A. MUSMECI | ) | |
| V. | ) | CIVIL ACTION No. 83-2119-N. |
| TOWN OF HULL, NANCY BURNS, E. RENO CONSTANTINIDES, CLAUDETTE FITZSIMMONS, and MYRON KLAYMAN, | ) | |

VERDICT SLIP.

Do you find in favor of (Plaintiffs)

| | (yes or no) |
|---|---|
| Nancy Dunn | Yes |
| David Miller, and | Yes |
| Richard Musmeci | Yes |

**IF NO, PLEASE STOP**

If "yes" as to which of the defendants?

| | |
|---|---|
| Town of Hull | Yes |
| Nancy Burns | Yes |
| E. Reno Constantinides | Yes |
| Claudette Fitzsimmons | Yes |
| Myron Klayman | Yes |

If you find in favor of any of the plaintiffs, please set out what amount of compensatory damages you award to each of the plaintiffs, if any.

| | |
|---|---|
| Nancy Dunn | $47,400 |
| David Miller | $26,370 |
| Richard Musmeci | $35,400 |

Do you award punitive damages to

| (Plaintiffs) | (yes or no) |
|---|---|
| Nancy Dunn | Yes |
| David Miller | Yes |
| Richard Musmeci | Yes |

If you award punitive damages, as to each, please set out the amount of damages that should be awarded to that plaintiff

| | |
|---|---|
| Nancy Dunn | $43,700 |
| David Miller | $43,700 |
| Richard Musmeci | $43,700 |

If you award punitive damages, please set out the specific defendant which you find is liable for such damages, and as to each the amount of said damages

| | |
|---|---|
| Nancy Burns | 42,100 |
| E. Reno Constantinides | 41,400 |
| Claudette Fitzsimmons | 42,100 |
| Myron Klayman | 5,500 |

You are instructed that as to <u>each</u> defendant you find liable for punitive damages, the award should not exceed $ <u>50,000.00</u>

<u>Please answer the following questions</u>:

1. Do you find that any of the defendants violated the rights of freedom of expression of the plaintiffs?

   Yes ___X___ No _____

2. Do you find that any of the defendants violated the rights of the plaintiffs to hold public office?

Yes ___X___ No _____

2B. Do you find that any of the defendants violated the rights of the plaintiffs to fair procedures as a matter of due process of law?

Yes ___X___ No _____

3A. Do you find that any of the defendants acted by threat, intimidation, or coercion so as to violate the rights of plaintiffs to hold public office as provided by the Massachusetts Constitution?

Yes ___X___ No _____

3B. Do you find that any of the defendants acted by threat, intimidation, or coercion so as to violate the rights of the plaintiffs to hold office as provided by the United States Constitution?

Yes ___X___ No _____

4. Do you find that the individual defendant Selectmen inflicted severe emotional distress on the plaintiffs as defined in my instructions to you without legal justification?

Yes _____ No ___X___

5. Do you find that the defendant Selectmen acted with good faith and upon reasonable grounds in their suspension and subsequent removal proceeding against the plaintiffs?

Yes _____ No ___X___

2/26/88 /s/ Sharon S. Bourque

Date Foreperson

## Appendix E.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| DAVID B. MILLER, NANCY E. DUNN, RICHARD A. MUSMECI, and ROBERT M. TONG, Plaintiffs, | ) | Civil Action No. 83-2119-N |
| v. | ) | COMPLAINT |
| TOWN OF HULL, MASSACHUSETTS, a municipal corporation, and E. RENO CONSTANTINIDES, NANCY BURNS, CLAUDETTE FITZ-SIMMONS, and MYRON KLAYMAN, individually and in their official capacities, Defendants. | ) | |

### Introduction

1. This is a civil rights complaint brought by the former members of the Hull (Massachusetts) Redevelopment Authority (the Redevelopment Authority) against the Town of Hull and the Selectmen for the Town of Hull, both personally and in their official capacities. The plaintiffs allege that the defendants removed them from their elected offices wrongfully and in violation of their federal and state constitutional rights.

### Jurisdiction

2. This Court has jurisdiction under 28 U.S.C. 1343(1), (2) and (3). The plaintiffs invoke the Court's pendant jurisdic-

their claims for violation of their state constitutional rights and for intentional infliction of emotional distress.

Parties

3. All of the plaintiffs and all of the personal defendants are residents of Hull, Massachusetts.

4. The plaintiff David B. Miller was the chairman of the Hull Redevelopment Authority at all times relevant to this matter, having been elected to the Redevelopment Authority by the voters of the Town of Hull in 1967, reelected in 1969 and then reelected at every election after that.

5. The Plaintiff Nancy E. Dunn was a member of the Hull Redevelopment Authority at all times relevant to this matter, having been first elected to that position in 1979 and reelected in 1981 and 1983.

6. The plaintiff Richard A. Musmeci was a member of the Hull Redevelopment Authority at all times relevant to this matter, having been first elected to that position in 1976.

7. The plaintiff Robert M. Tong was a member of the Hull Redevelopment Authority at all times relevant to this matter, having been appointed by the Commonwealth of Massachusetts, Department of Community Affairs to that position in 1980.

8. The defendant Town of Hull is a municipal corporation located in Plymouth County, Massachusetts.

9. The defendant E. Reno Constantinides is named both personally and in his official capacity as a selectman for the Town of Hull at all times relevant to this matter.

10. The defendant Myron Klayman is named both personally and in his official capacity as a selectman for the Town of Hull at all times relevant to this matter.

11. The defendant Nancy Burns is named both personally and in her official capacity as a selectman for the Town of Hull at all times relevant to this matter.

12. The defendant Claudette Fitzsimmons is named both personally and in her official capacity as a selectman for the Town of Hull at all times relevant to this matter.

Background

13. The Hull Redevelopment Authority is a body politic chartered pursuant to Mass. G.L. c. 121B following a Town Meeting vote in 1961. The Redevelopment Authority is chartered pursuant to state and federal law and is funded primarily by the federal government. All actions of the Authority are supervised and overseen by agencies of the federal government.

14. Members of the Authority are elected at large by the voters of the Town of Hull, with the exception of one member who, in accordance with the enabling legislation, is appointed by the Commonwealth of Massachusetts, Department of Community Affairs. All members serve without salary.

15. At a Special Town Meeting on or about May 13, 1968 the Town of Hull approved an Urban Renewal Plan for the upgrading of blighted areas in the town and authorized the Board of Selectmen and the Hull Redevelopment Authority to execute a cooperation agreement to carry out the purposes of the Urban Renewal Plan.

16. On or about May 15, 1968 the Hull Board of Selectmen and the Hull Redevelopment Authority executed the Cooperation agreement, stating in part:

> That the Town will take all necessary actions to assist the Authority in carrying out the Urban Renewal Plan, and that all Town Departments shall cooperate with the Authority to that end.

17. On or about August 8, 1978 the Hull Redevelopment Authority executed a land disposition agreement (Purchase and

Sale Agreement) with Consultants, Inc., a Rhode Island developer, for the construction of improvements on land owned by the Redevelopment Authority. The agreement was amended on various occasions and, on March 1, 1982, called for the erection of a federally funded low income elderly housing project on a certain parcel of urban renewal land.

18. For more than two years prior to March 1, 1982, the defendants, acting both individually and in their official capacities as selectmen for the Town of Hull, were engaged in a heated controversy with the Redevelopment Authority about the construction of this elderly housing. The defendants repeatedly expressed their opposition to the elderly housing project and with the actions of the Redevelopment Authority in contracting for the project.

Factual Allegations

19. In furtherance of their attempt to block the elderly housing project the defendants, acting willfully and maliciously, attempted to abolish the Hull Redevelopment Authority. In furtherance of this attempt the defendants voted to include an Article calling for the abolition of the Redevelopment Authority at a Special Town Meeting on September 1, 1981.

20. In a further attempt to block said elderly housing project, the defendant Nancy Burns sponsored and, at the urging of the defendants, the Town Meeting approved an article to limit construction of buildings on the site of the proposed elderly housing project to forty feet, a restriction that would have effectively blocked the project.

21. Although both articles were approved at the Special Town Meeting, the defendants failed to implement them because they came to the realization that their actions were illegal.

22. In December 1981, the Hull Planning Board, acting at the instigation of the defendants, took the procedural steps

required to rezone the land on which the elderly housing project was to be built to prohibit buildings in excess of forty feet.

23. On or about January 5, 1982 the defendants attempted to amend the Housing Assistance Plan for that parcel, which had previously been approved by the United States Department of Housing and Urban Development, to decrease the number of units from 150 to 75, which would have eliminated the said elderly housing project.

24. The defendants repeatedly stated, in public, in the news media and in a letter to the plaintiffs, that they would do everything within their power to block said elderly housing project.

25. In furtherance of this intention, the defendants contacted the Plymouth County District Attorney in January 1982 and sought criminal complaints against the plaintiffs for an alleged violation of the Massachusetts Open Meeting Law. The District Attorney found that allegation to be totally without foundation and found, to the contrary, that the plaintiffs had made particular efforts to comply with the requirements of that law.

26. Also in furtherance of this intention to block said elderly housing, the defendants wrote to various contractors and parties involved in the project in an attempt to intimidate them from further dealings with the Redevelopment Authority.

27. When all these actions were ineffective in blocking the elderly housing project, the defendants, acting willfully and maliciously, and acting as the official governing body of the Town of Hull, took steps to remove the plaintiffs from their duly elected positions.

28. At a duly authorized meeting of the Hull Board of Selectmen on March 1, 1982, the defendants voted to temporarily suspend the plaintiffs from their positions as elected members of the Hull Redevelopment Authority, allegedly pursuant to Massachusetts General Laws Chapter 121B, Section 6, per-

mitting such temporary suspension and permanent removal for inefficiency, neglect of duty or misconduct in office.

29. Immediately after this meeting ended, at some time shortly before midnight, the defendants ordered the Hull Police Department to stand guard at the principal office of the Redevelopment Authority and ordered the police officers to restrain the plaintiffs from entering the premises. The defendants had the locks to the office changed and ordered a notice that the plaintiffs had been suspended to be posted on the front door of said office.

30. All of these actions were taken without notice of any sort to the plaintiffs.

31. On March 2, 1982, uniformed Hull Police officers, acting at the direction of the defendants, delivered a notice to each plaintiff at his or her home at approximately 6:30 a.m. advising them that they were temporarily suspended from their elected positions with the Redevelopment Authority and that a hearing was scheduled for March 29, 1982. They were ordered to take no action on behalf of the Authority in the interim. The plaintiffs were still given absolutely no notice of the charges against them.

32. The plaintiffs immediately filed a complaint in the Probate & Family Court Department, Plymouth Division, seeking injunctive relief against the defendants. On March 2, 1982, said Court issued a temporary restraining order prohibiting the defendants from interfering with the plaintiffs in their capacities as elected officials of the Hull Redevelopment Authority.

33. On or about March 3, 1982, the defendant Constantinides contacted Frederick Alibrandi, an elected member of the Hull Redevelopment Authority, and advised Mr. Alibrandi that if Mr. Alibrandi would remove certain documents from the offices of the Redevelopmednt Authority and deliver them to the defendants, Mr. Alibrandi would not be suspended or removed from office with the other members of the Redevelop-

ment Authority. Mr. Alibrandi reported this offer to the other members of the Redevelopment Authority at a special emergency meeting on March 3, 1982.

34. Immediately after that special emergency meeting, the plaintiffs Miller and Dunn, together with Mr. Alibrandi, appeared at a meeting of the defendants, at the invitation of the defendants.

35. At that meeting, the defendants demanded that the plaintiffs change the 1968 Cooperation Agreement between the Redevelopment Authority and the Town and take steps to prevent the construction of the low income elderly housing complex. The defendants, using threats and intimidation, told the plaintiffs that unless such actions were taken by the plaintiffs, the defendants would again suspend them and remove them from their elected offices.

36. The plaintiffs, on advice of counsel, refused to do as demanded by the defendants. Mr. Alibrandi, however, said he was willing to yield to the defendants' demands.

37. After Mr. Miller and Mrs. Dunn left, the meeting of the Selectmen for the Town of Hull continued into the early morning hours of March 4, 1982, at which time the defendants again voted to suspend the plaintiffs from their positions with the Redevelopment Authority. The defendants voted to take no action, however, against Mr. Alibrandi. The defendants again ordered the Hull Police Department to stand guard at the office of the Redevelopment Authority, ordered the police officers to prevent the plaintiffs from entering and changed the locks on said office.

38. Immediately after that meeting, the defendants directed the Hull Police Department to deliver two notices to each plaintiff, one saying that the temporary suspension of March 1, 1982 had been rescinded and the other advising each that he or she had again been suspended and specifying identical allegations against each plaintiff. The allegations were of a

similar nature and can be summarized with the allegation that "[y]ou have neglected to observe the wishes of the townspeople . . ."

39. Immediately after suspending the plaintiffs from their positions, the defendants appointed replacement members of the Redevelopment Authority, who voted to breach their contract with the developer of the elderly housing project. Such action is the basis of a lawsuit in this Court.

40. In addition to suspending each of the plaintiffs, the defendants petitioned the Commonwealth of Massachusetts, Department of Community Affairs (DCA) regarding the plaintiff Robert Tong. Mr. Tong, in accordance with the enabling legislation for redevelopment authorities, had been appointed by the Commissioner of the DCA. The defendants presented their list of charges against the Redevelopment Authority members to the DCA and demanded that the DCA convene a hearing regarding Mr. Tong. After reviewing the list of charges the DCA responded to the defendants that it found no substance to any charge, that it saw no need for such a hearing and found no ground for suspension of Mr. Tong.

41. The defendants convened a series of nineteen lengthy hearings over the course of the following twelve months in which allegations against the plaintiffs were aired. The defendants, sitting as Selectmen for the Town of Hull, framed the charges against the plaintiffs; directed the investigation, utilizing police officers of the Town of Hull; presented the evidence; ruled on the admissibility of evidence, and made findings of fact and law.

42. The plaintiffs were forced to go to great personal expense to secure legal representation at these hearings. In addition, the plaintiffs Miller and Musmeci were having medical problems and were concerned about the effects of a series of stressful hearings on their health. As a result, each of the plaintiffs, except for the plaintiff Nancy Dunn, were compelled

to resign from their elected positions with the Redevelopment Authority. The plaintiff Dunn proceeded through more than a year of hearings without counsel, for economic reasons.

43. On March 12, 1983, more than a year after suspending the plaintiff Nancy Dunn, the defendants voted to remove her from her position with the Redevelopment Authority.

44. Two months later, Mrs. Dunn was reelected to the Redevelopment Authority at a general election held in May 1983.

45. At all times relevant, the individual defendants established the official policy and position of the defendant Town of Hull.

46. In all actions cited above, the defendants acted knowingly, willingly and maliciously, in bad faith and in total disregard of the state and federal constitutional rights of the plaintiffs.

47. In all actions cited above, the defendants acted under color of state law and under color of their positions as Selectmen for the Town of Hull.

48. In suspending and removing the plaintiffs from their positions as elected members of the Hull Redevelopment Authority, the defendants acted in knowing disregard of state law and standards for such suspensions and removals.

COUNT ONE

49. The defendants acted in violation of 42 U.S.C. § 1983, in denying the plaintiffs' rights of freedom of expression and assembly, as protected by the First Amendment of the United States Constitution.

COUNT TWO

50. The defendants acted in violation of 42 U.S.C. § 1983, in denying the plaintiffs' rights under the Fourteenth Amend-

ment of the United States Constitution in depriving them of their public offices without due process of law.

COUNT THREE

51. The defendants acted in violation of 42 U.S.C. § 1983, in violating the plaintiffs' rights under the Fourteenth Amendment of the United States Constitution in abridging their rights to hold public office.

COUNT FOUR

52. The defendants acted in violation of 42 U.S.C. § 1985(1), in preventing the plaintiffs from holding their duly elected and appointed offices, and from discharging the duties thereof, and in injuring them in their reputations and property on account of their lawful discharge of said duties.

COUNT FIVE

53. The plaintiffs invoke the Court's pendant jurisdiction.

54. The defendants, violated Massachusetts General Laws Chapter 12, Section 11I, when, acting by threat and intimidation, they violated the plaintiffs' said rights under the United States Constitution and in addition violated the plaintiffs's rights to be free to hold elected offices as protected by Article IX of the Massachusetts Declaration of Rights.

COUNT SIX

55. The plaintiffs invoke the Court's pendant jurisdiction.

56. The defendants, by their actions previously cited, intentionally inflicted great emotional distress and suffering on each of the plaintiffs.

57. As a result of all of the above actions by the defendants, the plaintiffs have been denied their rights to hold elected office, have suffered grievous physical and mental harm, have been held to public scorn and ridicule, have suffered damage to their reputation and to their businesses, and have been compelled to incur great legal expenses.

WHEREFORE, the plaintiffs respectfully request that this Court order the following relief against the defendants, jointly and severally:

1. That this Court award compensatory damages of one million dollars to each plaintiff;

2. That this Court award punitive damages of three million dollars to each plaintiff;

3. That this Court order payment to each plaintiff of the costs of this litigation and reasonable attorney's fees; and

4. That this Court order such other relief as it deems just.

A jury trial is hereby claimed.

DAVID B. MILLER, NANCY E. DUNN,
RICHARD MUSMECI and ROBERT TONG
By their attorney,

---

HARVEY A. SCHWARTZ,
PAUL W. SHAW,
SCHWARTZ & SHAW,
240 Commercial Street,
Boston, Massachusetts 02109.
(617) 227-2414

## Appendix F.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. NU-83-2119-N

DAVID B. MILLER, NANCY E. DUNN,
RICHARD A. MUSMECI and ROBERT M. TONG
*Plaintiffs*

*v.*

TOWN OF HULL, MASSACHUSETTS,
a municipal corporation,
and E. RENO CONSTANTINIDES,
NANCY BURNS, CLAUDETTE FITZSIMMONS,
and MYRON KLAYMAN, individually and
in their official capacities
*Defendants*

### ANSWER AND DEFENSES OF DEFENDANTS

1. No response is required to this paragraph, but if one was required, the Defendants would deny same.

2. As the Defendants deny the basic allegations of the Plaintiffs' complaint, the Defendants deny the allegations contained in paragraph 2.

3. The Defendants admit the allegations contained in paragraph 3.

4. The Defendants admit that the Plaintiff Miller was a chairman of the Hull Redevelopment Authority (H.R.A.) but are without knowledge or information upon which to form a

belief as to the allegations that he was chairman at all times relevant to this matter, and therefore denies same.

5. The Defendants admit that the Plaintiff Dunn was a member of the H.R.A. but are without knowledge or information upon which to form a belief as to the allegations that she was a member at all times relevant to this matter, and therefore denies same.

6. The Defendants admit that the Plaintiff Musmeci was a member of the H.R.A. but are without knowledge or information upon which to form a belief as to the allegations that he was a member at all times relevant to this matter, and therefore deny same.

7. The Defendants admit that the Plaintiff Tong was a member of the H.R.A. but are without knowledge or information upon which to form a belief as to the allegations that he was a member at all times relevant to this matter, and therefore deny same.

8. The Defendants admit the allegation contained in paragraph 8.

9. The Defendants admit that Defendant Constantinides is named a party to this action, but are without knowledge or information sufficient upon which to form a belief as to whether he is named both personally and in his official capacity at all times relevant to this matter and therefore deny same.

10. The Defendants admit the Defendant Klayman is named a party to this action, but are without knowledge or information sufficient upon which to form a belief as to whether he is named both personally and in his official capacity at all times relevant to this matter and therefore deny same.

11. The Defendants admit the Defendant Burns is named as a party to this action, but are without knowledge or information sufficient upon which to form a belief as to whether she is named both personally and in her official capacity at all times relevant to this matter and therefore deny same.

12. The Defendants admit the Defendant Fitzsimmons is named as a party to this action, but are without knowledge or information sufficient upon which to form a belief as to whether she [is] named both personally and in her official capacity at all times relevant to this matter and therefore deny same.

13. The Defendants admit the H.R.A. is a body politic created under M.G.L. c. 121B following a Town Meeting vote and that its project is funded primarily by the federal government, with state and local aid and funding. The Defendants deny that all actions of the H.R.A. are supervised and overseen by agencies of the federal government. The Defendants deny all other allegations of this paragraph.

14. The Defendants admit the allegations contained in paragraph 14.

15. The Defendants admit the allegations contained in paragraph 15 and by way of further answer, the Defendants state that said vote, plan and agreement speak for themselves.

16. The Defendants admit the allegations contained in paragraph 16 and by way of further answer the Defendants state that said agreement speaks for itself.

17. The Defendants admit that the H.R.A. executed a land disposition agreement with a developer for the development of the property controlled by the H.R.A.; the Defendants admit the H.R.A. amended, without Town Meeting approval the agreement (and the plan) on various occasions; by way of further answer the Defendants state the agreement and the amendments speak for itself; and by way of further answer, the Defendants state that they are without knowledge or information sufficient upon which to form a belief as to whether the agreement on March 1, 1982 did in fact call for the construction of elderly housing or whether, in view of the allegations of the Plaintiffs and their conduct while in office, it was a legal and binding agreement and therefore deny that portion of the allegations contained in paragraph 17. The Defendants deny the project was federally funded or for low income.

18. Based on the generality of the time period referred to in paragraph 18, the Defendants are without knowledge or information sufficient upon which to form a belief as to the allegations contained in paragraph 18 concerning unspecified Defendants acting both individually and in their official capacity and therefore denies same. By way of further answer and not waiving its denial, the Defendants will admit that the Defendants were concerned with the plans, conduct, activities and progress of the H.R.A. which related primarily to its financial condition and had expressed this concern to and discussed same with the H.R.A. and that any comment or disapproval to the elderly housing project or concept was based on location, safety factors and design considerations and not in opposition to the concept itself. By way of further answer, the Defendants state that at the various times referred to, there was no contract for the construction of elderly housing.

19. The Defendants admit that the Board of Selectmen voted to include an article on the Special Town Meeting warrant to see if the Town could petition the Legislature to enact a law, which if accepted by the people of Hull, would transfer the functions and obligations of the H.R.A. to another public entity; the Defendants deny all other allegations in paragraph 19.

20. The Defendants admit that Nancy Burns was a signatory to a citizens petition to see if Town Meeting would amend the Land Use Plan to establish a height of forty (40) feet; that Town Meeting voted to adopt said article; the Defendants are without knowledge or information sufficient upon which to form a belief as to whether the approval of said article was due to their urgings, if any, and therefore deny this allegation. The Defendants deny all other allegations of paragraph 20.

21. The Defendants deny the allegations contained in paragraph 21.

22. The Defendants admit that the Planning Board took procedural steps as required by M.G.L. c. 40A to hold hearings on a zoning change which would limit the height of buildings in certain districts to forty (40) feet, including that land on which an elderly housing complex was previously to have been built (which contract for construction had been declared by the Plaintiffs acting as the H.R.A. to have been breached by the contractor) and that the Defendants participated in this action in accordance with M.G.L. c. 40A. The Defendants deny all other allegations of paragraph 22.

23. The Defendants: 1. admit that they as the Board of Selectmen of the Town of Hull, took steps to amend the Housing Assistance Plan allocation to the H.R.A. area to reduce same by transfering [*sic*] said 75 units to another site for elderly housing: 2. deny said reduction would have eliminated the elderly housing complex, and 3. deny all other allegations of paragraph 23.

24. The Defendants are without knowledge or information sufficient upon which to form a belief as to the general allegations contained in paragraph 24 and therefore deny same; and by way of further answer the Defendants state that in an August 5, 1981 letter the Defendants objected to the reinstatement of an elderly housing complex previously deemed cancelled by the Plaintiffs on a certain parcel of land only as it would be inimical to proper development.

25. The Defendants admit the Defendants as the Board of Selectmen for the Town of Hull upon reading of remarks by the chairman of the H.R.A., referred certain allegations of open meeting law violations to the official responsible by law for enforcement of said statute, for appropriate action. The Defendants deny this was done to prevent the Plaintiffs from carrying out their legal duties and responsibilities or to block any project. The Defendants deny seeking criminal complaints. The Defendants admit the District Attorney did not find that a

violation had occurred and that the H.R.A. made efforts to comply with the law. The Defendants are without knowledge or information sufficient upon which to base a belief as to the remainder of the allegations contained in paragraph 25 and therefore denies same.

26. The Defendants admit that in January of 1982 the Defendants as the Board of Selectmen wrote to the previously designated contractor and in April of 1982 wrote to the Department of Environmental Quality Engineering but deny said letters were in an attempt to intimidate anyone. The Defendants deny the remainder of the allegations of paragraph 26.

27. The Defendants admit that acting as the Board of Selectmen for the Town of Hull they took steps under M.G.L. c. 121B, section 6, to see if the Plaintiffs should be removed from office for neglect of duty and inefficiency based on eleven (11) charges followed by six (6) additional charges, attached as Exhibit A. The Defendants deny all other allegations contained in paragraph 27, specifically that said actions were designed to block any housing project or that they acted willfully and maliciously.

28. The Defendants Constantinides, Burns, and Fitzsimmons admit that as members of the Board of Selectmen they voted to suspend Plaintiffs Miller, Dunn and Musmeci for the reason specified in Answer No. 27; the said Defendants deny suspending Plaintiff Tong; the Defendant Klayman denies taking the action described in paragraph 28. The Defendants deny all other allegations contained in paragraph 28.

29. The Defendants Constantinides, Burns and Fitzsimmons deny ordering the Hull Police Department to take any action. The Defendants admit they requested the Hull Police Department to take steps to secure the building and access to same. The Defendants deny taking any action to prevent the Plaintiff Tong from entering the building. The Defendants deny having the locks changed but do admit to posting a notice

of the action taken in suspending the Plaintiffs Miller, Dunn and Musmeci for the reason of informing the H.R.A. employees of the action taken and requesting they contact the new members. The Defendant Klayman denies all allegations contained in paragraph 29 and the Defendants deny the remainder of the allegations contained in paragraph 29.

30. The Defendants are without knowledge or information sufficient upon which to form a belief as to the allegations contained in paragraph 30 and therefore denies same.

31. The Defendants Constantinides, Burns and Fitzsimmons admit that said notices were given to the Plaintiffs, except that Plaintiff Tong was not given said notice as no such action was taken against him. The Defendants admit that the specifics of the charges were not at this time given to the affected Plaintiffs. The Defendant Klayman denies that the police were acting at his direction or that he participated in any of the acts complained of in this paragraph. The Defendants deny all other allegations of paragraph 31.

32. The Defendants admit the allegations contained in paragraph 32 but state that said order was limited to the actions on March 1, 1982.

33. The Defendants deny the allegations contained in paragraph 33.

34. The Defendants admit the Plaintiffs Miller and Dunn met with the Board of Selectmen and by way of further answer the Defendants state that said meeting was at the initiation of their respective counsel.

35. The Defendants deny the meeting took place as described in paragraph 35 and by way of further answer, the Defendants state that any requested change in the Cooperation Agreement was to limit the Town's financial liability to the Urban Renewal Project.

36. The Defendants were without knowledge or information sufficient upon which to form a belief as to the allegations contained in paragraph 36 and therefore deny same.

37. The Defendants admit that the Board of Selectmen rescinded its vote of March 1, 1982 and revoted to suspend the Plaintiffs Miller, Dunn and Musmeci and to refer charges against Plaintiff Tong to D.C.A. The Defendants incorporate by reference its answer to allegation 29 herein. The Defendants deny all other allegations contained in paragraph 37.

38. The Defendants admit that the Board of Selectmen requested the Hull Police Department to deliver said notices as described to all Plaintiffs except Tong. The Defendants deny that the allegations are properly summarized as stated in paragraph 38 and would incorporate herein Exhibit A attached hereto. The Defendants deny all other allegations contained in paragraph 38.

39. The Defendants deny suspending Plaintiff Tong. The Defendants admit that in accordance with M.G.L. c. 121B, Section 6, they appointed temporary replacement members. Any votes taken by the H.R.A. speak for themselves. The Defendants deny the H.R.A. voted to breach any contract. The Defendants admit that there is another suit in this court concerning the developer and its contract. The Defendants deny all other allegations contained in paragraph 39.

40. The Defendants deny that Plaintiff Tong was suspended. The Defendants admit to referring to D.C.A. the charges against Plaintiff Tong, as required by statute. The Defendants admit Plaintiff Tong had been appointed by D.C.A. The Defendants admit that D.C.A. was requested to take appropriate action relative to the charges against Plaintiff Tong. The Defendants are without knowledge or information sufficient upon which to form a belief as to whether or how D.C.A. reviewed the charges and therefore denies same. The Defendants admit that D.C.A. took no action against Plaintiff Tong. The Defendants deny all other allegations contained in paragraph 40.

41. The Defendants admit that a hearing process, as called for by statute (M.G.L. c. 121B, Section 6) was convened and

that nineteen hearings were held concerning the seventeen (17) charges and by further answer, the Defendants state that no hearing concerned charges against Plaintiff Tong and only two hearings concerned charges against Plaintiffs Miller and Musmeci as they resigned. The Defendants admit that in accordance with the applicable statute (M.G.L. c. 121B, Section 6) they made charges against certain of the Plaintiffs and as required by said law held hearings on said charges. By way of further answer, the Defendants admit that certain information which as related to a police investigation was presented at the hearings but that was the extent of police involvement, evidence was presented by several parties, including the Plaintiff Dunn, that the Defendants ruled on certain evidence and made findings of fact and conclusions under the law. By way of further answer the Defendants state that the Plaintiffs Miller, Dunn and Musmeci were initially represented by counsel and had the opportunity to cross examine witnesses, introduce evidence and testify, as was done by Plaintiff Dunn. The Defendant Constantinides denies the allegations as relate to him from and after May 6, 1982.

42. The Defendants are without knowledge or information sufficient upon which to form a belief as to an personal expense incurred by the Defendants, medical problems, why they resigned after the first hearing or why Plaintiff Dunn chose to proceed without counsel, and therefore deny the allegations contained in paragraph 42.

43. The Defendants admit that in accordance with State Law (M.G.L. c. 121B, Section 6) the Defendants, Burns and Fitzsimmons, voted to remove Plaintiff Dunn from office on the basis of the charges found to be established against her. The Defendants Klayman and Constantinides deny the allegations contained in paragraph 43.

44. The Defendants admit the allegations contained in paragraph 44.

45. The Defendants are without knowledge [or] any [*sic*] information sufficient upon which to form a belief as to the allegations contained in paragraph 45 and therefore deny same.

46. The Defendants deny the allegations contained in paragraph 46.

47. The Defendants are without knowledge or information sufficient upon which to form a belief as to the allegations contained in paragraph 47 and therefore deny same.

48. The Defendants deny the allegations contained in paragraph 48.

Count One

49. The Defendants deny the allegations contained in paragraph 49.

Count Two

50. The Defendants deny the allegations contained in paragraph 50.

Count Three

51. The Defendants deny the allegations contained in paragraph 51.

Count Four

52. The Defendants deny the allegations contained in paragraph 52.

Count Five

53. The Defendants deny the right to invoke pendant jurisdiction.

54. The Defendants deny the allegations contained in paragraph 54.

Count Six

55. The Defendants deny the right to invoke pendant jurisdiction.

56. The Defendants deny the allegations contained in paragraph 56.

57. The Defendants deny the allegations contained in paragraph 57.

DEFENSES

1. The Court lacks jurisdiction over the subject matter of these allegations.

2. The Complaint fails to state a claim upon which relief can be granted.

3. The Plaintiffs, by their conduct and under the law, are estopped from bringing this Complaint.

* * * * *

5. The actions of the Defendants were the subject of a prior action and thus the principle of res judicata precludes this action against the Defendants.

* * * * *

7. By the actions of the Plaintiffs, they have waived any claim stated in the complaint.

* * * * *

9. All actions done by the Defendants and/or their agents, officers, officials and employees, were done in compliance with applicable law.

* * * * *

11. The actions of the Defendants were taken due to their obligation and responsibility to protect the fiscal and legal position of the Town of Hull.

12. Audits, administrative and financial reports and observations indicated that the actions of the Defendants warranted and necessary as the Plaintiffs were undertaking a course of action to incur debts for which they did not have sufficient funds and which debts may have become a liability to the Town of Hull and other actions inconsistent with their responsibility and duty to the public.

13. The actions of the Defendants were taken due to the fiscal and administrative conduct and mismanagement of the Plaintiffs which constituted and established a basis for the charges of inefficiency and neglect of duty by the Plaintiffs.

14. The actions of the Defendants were legal, proper and necessary under M.G.L. c. 122B, Section 6.

15. The Defendants did not interfere with the Plaintiffs' rights of freedom of expression and assembly.

16. The Defendants did not deprive the Plaintiffs, abridge or interfere with any rights they might have had to hold public office without due process of law.

17. The Plaintiffs Miller and Musmeci rejected and failed to exercise the due process available and accorded them by the Defendants.

* * * * *

19. The Plaintiff Dunn availed herself of as she saw fit and was accorded due process of law by the Defendants.

* * * * *

21. The Defendants deny that their actions were taken in opposition to housing which concept the Defendants support.

22. The Defendants did not act with any design or intent to injure the reputations and property of the Plaintiffs, to inflict emotional distress and suffering in the Plaintiffs, to cause them to suffer physical or mental harm, to have been held to public scorn and ridicule or to cause them to incur great legal expense. Any such result, if it occurred, was the result of the actions of the Plaintiffs or other parties and entities over which the Defendants have no control.

23. The evidence considered by the Defendants, including that introduced by the Plaintiffs, justified and supported the actions of the Defendants.

24. The Defendants did not act by threat or intimidation in their actions, nor did they violate any rights of the Plaintiffs under the constitutions or laws of the United States or the Commonwealth of Massachusetts.

* * * * *

29. All statements and actions of the Defendants were privileged and therefore the Defendants are immune from liability.

30. Any actions taken by the Defendants with respect to matters covered in the Complaint are entitled to immunity because they were done reasonably and in good faith, without ill will, bad faith or malice.

31. The Complaint fails to properly allege that the Defendant subjected, or caused to be subjected, the Plaintiffs to the deprivation of any rights, privileges or immunities secured by the Constitution within the meaning of 42 U.S.C. § 1983.

* * * * *

34. The individual members of the Board of Selectmen named as Defendants were at all times relevant to the allegations of the

Complaint elected officials of the Town. In their capacities as members of the Board of Selectmen, they are and were required to perform legislative functions on behalf of the Town, including but not limited to the proposals of articles for inclusion in the warrant for Town Meeting which might affect the Town of Hull, the Urban Renewal Plan and/or change the zoning by-laws of the Town or amend the Housing Assistance Plan. At all times relevant to the allegations of the Complaint, and with respect to all of the actions alleged to have been taken by these Defendants, the said Defendants acted in a legislative capacity and are therefore immune to liability in damages.

35. The individual members of the Board of Selectmen named as Defendants were at all times relevant to the allegations of the Complaint elected officials of the Town. In their capacities as members of the Board of Selectmen, the Defendants were required to exercise their independent judgment and discretion in the performance of their duties. At all times relevant to the allegations of the Complaint, and with respect to all of the actions alleged to have been taken by these Defendants, these Defendants were exercising their independent judgment and discretion, were acting reasonably, without malice, ill will or bad faith towards the Plaintiffs, in good faith, and within the scope of their duties. These Defendants by their actions did not intend to deprive the Plaintiffs of any of their rights under the Constitution or laws of the United States or the Commonwealth of Massachusetts. These Defendants did not know and could not reasonably have known that their actions might violate the Plaintiffs' clearly established constitutional rights, if in fact such rights were violated. Accordingly, these Defendants are immune from an action for damages.

36. The official policy and custom of the Town of Hull is at all times to act with due regard for the rights of all persons and entities and in a fair, legal and proper manner consistent with

its obligation under the law. The Town of Hull specifically denies any inference or implications that its policies or customs violate or cause to be violated or are intended to violate the rights of any person or entity. The Town of Hull is therefore immune from suit and liability.

* * * * *

38. The Defendants were acting in an executive/quasi judicial (judicial) function and thus are immune from suit and liability.

* * * * *

44. At the time Town Meeting voted in September, 1981, to amend the Urban Renewal Plan to restrict the height of buildings to 40 feet, no contract was in existence between the H.R.A. and the developer, the Contract having been terminated on or about July 1, 1981 by the Plaintiffs and thus the Defendants could not have interfered with the Plaintiffs in relation to said contract.

* * * * *

WHEREFORE, the Defendants pray this Honorable Court to:

1. Dismiss the Complaint against the Defendants.

2. Award the Defendants reasonable attorney's fees and costs.

3. Grant such other relief as the Court deems meet and just.

Respectfully submitted
the Defendants
by their attorney

JAMES B. LAMPKE, ESQ.
TOWN COUNSEL
11 Beacon St., Suite 415
Boston, MA 02108
(617) 227-5200

## Appendix G.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| DAVID B. MILLER, NANCY E. DUNN, RICHARD A. MUSMECI, and ROBERT M. TONG, Plaintiffs, v. TOWN OF HULL, MASSACHUSETTS, a Municipal Corporation, and E. RENO CONSTANTINEDES, [*sic*] NANCY BURNS, CLAUDETTE FITZ-SIMMONS, and MYRON KLAYMAN, Individually and in Their Official Capacities, Defendants. | ) | CIVIL ACTION No. 83-2119-N. |

ALL PARTIES' STIPULATION OF FACTS.

STIPULATION.

Pursuant to the Court's Pretrial Order, all parties hereby stipulate to the following agreed facts.

1. The plaintiff David Miller was elected to the Hull Redevelopment Authority by the voters of the Town of Hull in 1969; reelected in 1969, 1974, and 1979; his five-year term of office was to expire in 1984.

2. Nancy E. Dunn was first elected to the Hull Redevelopment Authority in 1979; and was reelected in 1981 for a five-year term to expire in 1983.

3. Richard A. Musmeci was first elected to the Hull Redevelopment Authority in 1976; and was reelected in 1978 for a five-year term to expire in 1983.

4. Robert M. Tong was appointed to the Hull Redevelopment Authority in 1980 by the Massachusetts Department of Community Affairs.

5. Mr. Miller, Mrs. Dunn, Mr. Musmeci, and Mr. Tong were members of the Hull Redevelopment Authority throughout 1981 and through January and February and as of March 1, 1982.

6. The fifth member of the Hull Redevelopment Authority on March 1, 1982, was Frederick Alibrandi. Mr. Alibrandi also was an elected member of the Redevelopment Authority.

7. The defendant E. Reno Constantinedes [*sic*] was elected to the Board of Selectmen by the voters of the Town of Hull in 1979. He served on the Board for the three-year period from 1979 to 1982. He became Chairman of the Board in May, 1982.

8. The defendant Nancy K. Burns was elected to the Board of Selectmen in 1981. She served for the three-year period from 1981 to 1984.

9. The defendant Claudette Fitzsimmons was elected to the Board of Selectmen in 1980, for a three-year term; and was reelected for an additional three-year terms in 1983 and in 1986.

10. The defendant Myron Klayman was elected to the Board of Selectmen in 1975; and was reelected for three-year term in 1977 and 1980.

11. As of 1982, the Board of Selectmen constituted a governing body of the Town of Hull. The members served in addition to the performance of their own private occupations. They received annual compensation of $800.00.

12. In 1961, in accordance with state law, a vote of the Hull Town Meeting established the Hull Redevelopment Authority.

13. By its charter and in accordance with state law, the five members of the Hull Redevelopment Authority were elected at large by the voters of the Town of Hull, with the exception of one member who was appointed by the Massachusetts Department of Community Affairs.

12. The members of the Hull Redevelopment Authority served without salary on a voluntary basis.

13. At a special Town Meeting on May 13, 1968, the Town of Hull officially approved an Urban Renewal Plan for the upgrading of blighted areas in the town. At that special Town Meeting the voters of the Town of Hull authorized the Board of Selectmen and the Hull Redevelopment Authority to execute a Cooperation Agreement to carry out the purposes of the Urban Renewal Plan.

14. On May 15, 1968 the Hull Board of Selectmen and the Hull Redevelopment Authority signed the Cooperation Agreement.

15. During the summer of 1981 the Board of Selectmen voted to place an Article before the September 1, 1981 Town Meeting calling for the abolition of the Hull Redevelopment Authority.

16. This Article was offered and supported by the Selectmen at the Town Meeting on September 1, 1981. The Town Meeting approved the Article. The defendants took no action to enforce that Article.

17. Further events and communication transpired between the Selectmen and the Redevelopment Authority during the autumn of 1981 and the winter of 1981-1982.

18. On March 1, 1982, the Board of Selectmen lodged certain charges of "inefficiency and neglect of duty" against Redevelopment Authority Members David Miller, Richard A. Musmeci, Nancy E. Dunn, and Frederick Alibrandi.

19. Also on March 1, 1982, the Board of Selectmen voted to suspend temporarily those same Redevelopment Authority members until completion of a hearing upon the charges. The Selectmen scheduled a hearing session for Monday, March 29, 1982.

20. Also on March 1, 1982, the Selectmen lodged the same charges against Redevelopment Authority member Robert M. Tong by letter to the Commissioner of the Massachusetts Department of Community Affairs. The Selectmen requested the Department of Community Affairs to suspend temporarily Mr. Tong until completion of a hearing upon the charges.

21. On or about March 3 and 4, 1982, members of the Selectmen met with Redevelopment Authority member Alibrandi. As a result of discussions between them, the Selectmen voted to take no further action against Mr. Alibrandi.

22. On or about March 15, 1987, the Selectmen amended the original charges by addition of several further allegations of inefficiency and neglect against those Redevelopment Authority members other than Alibrandi.

23. On or about March 29, 1982, the Selectmen commenced hearings upon all charges.

24. In April, 1982, after completion of three hearing sessions, Redevelopment Authority members Miller and Musmeci resigned their positions.

25. Also in April, 1982, Redevelopment Authority member Robert M. Tong resigned his position.

26. During the period of March, 1982, through March, 1983, the Selectmen proceeded with hearing sessions upon all charges against the remaining member of the Redevelopment Authority, Nancy E. Dunn. The procedure concluded after 19 hearing sessions.

27. By Decision rendered on or about March 12, 1983, the Selectmen concluded that the evidence sustained 15 of the 17

charges lodged against Mrs. Dunn and voted to remove her from membership in the Redevelopment Authority.

By their attorneys,

HARVEY A. SCHWARTZ
PAUL W. SHAW
SCHWARTZ, SHAW & GRIFFITH
204 Portland Street
Boston, MA 02114
(617) 227-2414

Counsel for All Plaintiffs
*Dated*:

MITCHELL J. SIKORA, JR.
VINCENT L. DICIANNI
FERRITER, SCOBBO, SIKORA,
CARUSO & RODOPHELE, P.C.
One Milk Street, Suite 500
Boston, MA 02109
(617) 423-0830

Counsel for All Defendants
*Dated*: 12-7-87

## Appendix H.

## TOWN OF HULL

Board of Selectmen
March 4, 1982

The Board of Selectmen acting under authority granted it in MGL Chapter 121B, Sect. 6, hereby makes the following charges against you as a member of the Hull Redevelopment Authority.

1. You have neglected to manage your financial affairs prudently and efficiently. You have expended funds and made commitments, explicit or implied, to expend funds that to the best of our knowledge are in excess of funds available to you. As of March 1982 you have exhausted all but approximately $18,000 of the $914,312 in "Urgent Needs" funds granted to you circa 1977. From the HUD Capital Grant you have expended all but $225,948 which is not even enough to cover your indebtness of $268,000 in outstanding project notes.

2. Your inefficiency and neglect in regard to your financial affairs has caused the Town of Hull to lose $304,000 in Community Development funds. This amount was withheld by HUD from the Community Development Entitlement Program and given to the HRA.

Community Development money was diverted from such public needs as playgrounds, support for social services such as Friend to Friend, the public library, medical center, senior citizen activities and other public uses and/or facilities.

3. From all appearances you have adopted a posture whereby you intend to continue to incur costs even though your funds are known to you to be insufficient to cover said

costs, expecting the Town of Hull to pay for such costs by virtue of the Cooperation Agreement. Such action constitutes a neglect of responsible and sound fiscal policy.

4. You have neglected to secure an adequate level of financial assistance in the form of Urban Renewal Assistance Grants from the Commonwealth, as provided for in the statute.

5. To the best anyone can determine you have neglected to adopt a development plan or development strategy. You have not taken any step to secure as executive director a person qualified by training or prior experience. This has resulted in a general inefficiency and wasteful operations whereby matters are referred to consultants whose hourly rates range from $10 to $80.

6. You have neglected to take steps to counter the statement of the executive director quoted in the Boston Globe Magazine article as ". . . we've had a product nobody wants — its like trying to sell ice cubes at the North Pole," thus creating an image of a poor product. Your failure to foster a correct image of the desirability of the Urban Renewal land has contributed to the general inefficiency and inability to secure project development.

7. Parcel 15 also referred to in HRA documents as parcel 9-18 is the property on which facilities of the Municipal Light Board (MLB) are located. You have neglected to chart a predictable course for the acquisition and/or development of this parcel thereby leaving the MLB unable to make plans.

In fact in a prior agreement with Consultants Inc. you had agreed to sell Parcel 15 to Consultant Inc. even though you had not acquired title to it. By creating a state of limbo as to the HRA's intent you have prevented the Town and MLB from acting prudently and developing an alternative site and plans,

thereby resulting in the potential for greater relocation costs and inconvenience to the Town, MLB and consumers.

8. You have on the one hand expended, and caused others to expend, large amounts of money on studies pertaining to a marina on the bayside (parcels 14, 14A and 15). On the other hand, you have simultaneously made and/or maintained commitments which preclude the development of a marina on the bayside.

As of March 1982 you do not own and have not made plans for the acquisition of parcel 15 and you have refused to discuss the matter and any transfer of title with Selectmen and the Municipal Light Board. You have an agreement with Consultants Inc. dedicating parcel 14A to section 8 housing and parcel 14 to implantation of marsh grass.

Such inconsistency has contributed to inefficiency of operations.

9. From the Hull Urban Renewal Plan as mailed by the Hull Redevelopment Authority to residents in the spring of 1968, "Dear Friend: This is the Hull Urban Renewal Plan that your town officials have developed along with the United States Government in order to pump vitality into our Town.

I want to thank all of you who contributed your time, effort and suggestions to this first step toward doing something about our tax rate; and Hull's future. Without your help and encouragement over the last few years, none of what we are about to embark on would be possible. This is *your* plan; for your future, and your children's future.

This plan fixes the manner in which these thirty acres must be developed. Our Town Meeting is our governing body, and only the Town Meeting can change anything in here after you vote for it on May 13; neither this Authority nor any body other than yourselves has that power.

This planning solution addresses itself primarily to our economic problem — our soaring tax rate — and was carefully checked and evaluated by the Federal Government Planners before they let us and our planning consultants bring it to you for your approval. The maps referred to in the Plan are available to you in our office.

It is now up to you. Give us your support on May 13 and let us together move Hull forward into a healthy future. Sincerely, Charles E. Gould, Chairman."

Despite this commitment, you have from time to time operated in complete disregard of the essence of the Urban Renewal Plan as spelled out in the Plan itself and in the statement quoted above. You have neglected your duty to seek town meeting approval as represented to townspeople in 1968.

In particular, you have disregarded the action of the September 1981 Special Town Meeting which action amended the Urban Renewal Plan. You have neglected to observe the wishes of the townspeople as established under article 5, Sept. 24, 1981, Special Town Meeting by knowingly entering into contractual obligations with Consultants Inc. in a manner contrary to the vote of the town meeting. You have in fact given every appearance of placing the interests of a developer above the expressly stated interest of the town as voted at the Special Town Meeting.

10. Circa 1977 you prevailed on the Board of Selectmen to adopt a Housing Assistance Plan (HAP) allocating 150 units of elderly/handicapped to the Urban Renewal Area on the premise that these units were necessary to make feasible the construction of commercial and business structures and luxury units. You subsequently signed an agreement with a developer calling for all construction — elderly, luxury and commercial to proceed simultaneously. Although your agreement allowed you to enforce the requirements that planning and construction

proceed simultaneously you were negligent and failed to exercise your rights to implement the terms of the agreement. In July 1981 you terminated the agreement with the developer and yet instituted a new agreement or amendment in December 1981 which relieves the developer of any responsibility except for elderly housing.

Your negligence in enforcing the contractual provisions of simultaneous development of elderly, luxury and commercial structures has violated not only the goals of the Hull Urban Renewal Plan but also the premise on which the HAP allocation was granted by Selectmen.

You have repeatedly given the impression that the construction of elderly housing was certain and imminent, thereby depriving other town agencies from favorable consideration of their plans for elderly housing.

11. Although you have proclaimed your expertise in matters pertaining to Urban Renewal you have assigned all significant tasks, including negotiation and research, to outside consultants and/or counsel thereby incurring exorbitant costs.

# TOWN OF HULL

BOARD OF SELECTMEN

MUNICIPAL BUILDING
HULL, MASSACHUSETTS 02045

March 15, 1982

You are hereby notified that the Board of Selectmen voted March 15, 1982 to amend the charges it made and sent to you on March 4, 1982 and herein makes the following additional charges pursuant to M.G.L. Chapter 121B, Section 6.

12. Your inability to maintain accurate records of your obligations on the "Topics Program" has resulted in the Town of Hull and your agency expending unnecessary allocations of time and money to determine the correct state of your financial obligation in this matter. Furthermore, you have failed to account for all of the funds processed to you from the Town of Hull in this matter thus indicating indifference, neglect and inefficiency on your part and that of the staff for which you are responsible.

13. You have set annual budgets for calendar year 1981 and fiscal year 1982 and have expended funds in excess and apparent disregard of said budgets.

14. The Town's share toward project costs was increased by $38,546 in 1974; yet, the Authority failed to request such money from the Town until January 26, 1982. When the Board of Selectmen requested a meeting to discuss the money request with the Authority and HUD, you reacted by instituting a legal suit resulting in additional legal expenses and complicating the situation causing the matter to remain unresolved. Such response indicates indifference, neglect and inefficiency on your part.

15. You failed to implement a parking lot plan in a timely manner thereby losing at least $2,000 in parking money in

1981. Moreover, you failed to operate your parking lots in such a manner so as to maximize the income potential to be realized from same, and you have failed to keep records consistent with acceptable standards in regard to said income.

16. You have engaged in a course of conduct, and have approved a course of conduct, whereby the Authority approved payments for various meals, travel expenses and entertainment, including alcoholic beverages, which were excessive for the executive director, other employees, various members and other parties, which were not in conformance with the guidelines set forth by HUD and which are contrary to the local standards/procedures of other boards and committees in the Town; and which are not in accordance with applicable law.

Furthermore, you have engaged in a course of conduct, and have approved a course of conduct, whereby the Authority has made purchases and other expenditures which would appear to be excessive and unreasonable and not prudent, particularly considering the fact that you are using public funds.

17. Although previously warned by appropriate authorities of your noncompliance with the provisions of the Open Meeting Law, you have engaged in and you have approved a course of conduct, whereby the Authority engages in actions not in conformance with the provisions of the Open Meeting Law.

/s/ _____
E. Reno Constantinides

/s/ _____
Claudette M. Fitzsimmons

/s/ _____
Nancy K. Burns

## Appendix I.

William F. Wallace
Attorney at Law
30 North Street, Hingham, Mass. 02043
(617) 749-7740

May 28, 1981

Consultants, Inc.
186 Broad Street
Providence, Rhode Island 02903

Att: Mr. Sanford M. Horvitz, Vice President

Re: Hull Redevelopment Authority

Gentlemen:

On behalf of the Hull Redevelopment Authority, you are hereby notified, pursuant to Article 7, Section 703(C) of Part II of the Contract for Sale of Land for Private Development By and Between the Hull Redevelopment Authority and Consultants, Inc. dated August 8, 1978 (which contract is hereinafter referred to as the Agreement), that you are in default of or in breach of said Agreement as follows:

1) You have failed to submit construction plans as required by the Agreement within the times specified.

2) You have failed to furnish the Hull Redevelopment Authority with evidence that you have the necessary equity capital and mortgage financing, in satisfactory form and in the manner and by the dates respectively provided in the Agreement, as amended.

3) You have failed to pay the purchase price and take title to the property within the times required by the Agreement, as amended.

Demand is made upon you pursuant to said Section 703(C) of said Agreement to cure the defaults and/or failures referred to above within thirty (30) days of receipt of this notice. If you do not cure said defaults and/or failures as required, the Hull Redevelopment Authority intends to exercise its rights to terminate said Agreement and retain the deposit as liquidated damages.

Very truly yours,
Hull Redevelopment Authority
By its General Counsel,

William F. Wallace

William F. Wallace
Attorney at Law
30 North Street, Hingham, Mass. 02043
(617) 749-7740

July 1, 1981

Consultants, Inc.
186 Broad Street
Providence, Rhode Island 02903

Re: Hull Redevelopment Authority

Gentlemen:

Inasmuch as you have failed to cure the defaults and or failures in connection with the Land Disposition Agreement executed by Consultants, Inc. and the Hull Redevelopment Authority on August 8, 1978 as demanded in my letter to you of May 28, 1981, please be advised that the Hull Redevelopment Authority exercises its option to terminate said Agreement.

As you know, in accordance with Section 703(c) the deposit (bond) shall be retained by the Agency as liquidated damages without any deduction, offset or recoupment whatsoever, and neither Consultants, Inc., nor the Hull Redevelopment Authority shall have any further rights against or liability to the other under the said Agreement.

Furthermore, demand is hereby made upon Consultants, Inc., in accordance with the terms of Section 703(c), Section 3(b) of Part I of said Agreement and the good faith deposit bond executed by Seaboard Surety Company dated August 8, 1978, for the penal sum of $120,000.00.

Very truly yours,

William F. Wallace

WFW/ah

cc: Stephen L. Howard, Esquire

Certified Mail
Return Receipt Requested

**Town of Hull**

Board of Selectmen

MUNICIPAL BUILDING
HULL, MASSACHUSETTS 02045

December 16, 1981

David Miller, Chairman
Hull Redevelopment Authority
2 Samoset Avenue
Hull, MA 02045

Dear Mr. Miller:

The Board of Selectmen voted at its December 12, 1981 meeting to request the Hull Redevelopment Authority not to make any further commitments for which there are no funds.

Your cooperation will be appreciated.

Sincerely,

Christopher J. McCabe
Executive Secretary

CJM/cf

**Hull Redevelopment Authority**

Hull, Massachusetts 02045 (617) 925-3382
925-4081

December 18, 1981

Christopher J. McCabe
Executive Secretary
Board of Selectmen
Municipal Building
Hull, MA 02045

Dear Mr. McCabe:

Received your letter of December 16, 1981, whereby the Board of Selectmen request that the Hull Redevelopment Authority cease to function as an elected authority.

As Brigadier General Anthony C. McAuliffe, Commanding Officer of the beseiged 101st Airborne Division at Bastogne, replied to General Heinrich von Luttwitz, Corps Commander of the S.S. Panzer Lehr Division and 26th Volks Grenadier Division, "NUTS!"

Sincerely,

David B. Miller, Chairman

DBM/jmc

# AMENDMENT NUMBER EIGHT TO CONTRACT FOR SALE OF LAND FOR PRIVATE REDEVELOPMENT BY AND BETWEEN HULL REDEVELOPMENT AUTHORITY AND CONSULTANTS INCORPORATED

WHEREAS, on August 8, 1978 the HULL REDEVELOPMENT AUTHORITY (the "Agency") and CONSULTANTS INCORPORATED (the "Redeveloper") entered into a Contract for Sale of Land for Private Redevelopment, as amended from time to time by seven prior amendments (the "Agreement"); and

WHEREAS, the Redeveloper desires to release its right to purchase and develop Parcels 1, 1A, 2, 3A, 3B, 4, 14 and 15 of the urban renewal project known as "Town Center #1, Mass. R-124 Project" (the "Urban Renewal Plan"), on the terms hereinafter set forth; and

WHEREAS, Each of the Redeveloper and the Agency desires that the Redeveloper purchase and develop Parcel 14A of the Urban Renewal Plan for elderly housing in accordance with the Agreement, as amended hereby.

NOW, THEREFORE, the parties hereto agree as follows:

1. Part 1, Section 1 of the Agreement is hereby deleted in its entirety and the following is substituted in its place:

> "SECTION 1. SALE: PURCHASE PRICE. Subject to all the terms, covenants, and conditions of the Agreement, as amended, the Agency shall sell Parcel 14A to the Redeveloper, and the Redeveloper shall purchase Parcel 14A from the Agency. The purchase price for Parcel 14A shall be $180,000 and shall be paid in cash or by certified check simultaneously with the delivery of the deed conveying Parcel 14A to the Redeveloper."

* * * * *

[Dated and signed December 21, 1981 by Consultants, Inc. Signed December 31 by Hull Redevelopment Authority. Announced on or about January 7, 1982.]

TOWN CLERK'S OFFICE
Hull, Massachusetts

CERTIFIED COPY OF EXCERPT FROM MINUTES OF SPECIAL TOWN MEETING HELD ON SEPTEMBER 24, OCTOBER 1 and 5, 1981

ARTICLE 21. To see if the Town will vote to petition the General Court of the Commonwealth of Massachusetts to enact special legislation for the Town of Hull which legislation shall, in effect, enable the voters of the Town of Hull through a referendum question at a general or special election to abolish the Hull Redevelopment Authority, notwithstanding any provisions of Chapter 121b or any other law, provided that the question shall be so phrased that, should it be answered in the affirmative, provision shall be made for the orderly transfer of the duties and responsibilities of the Hull Redevelopment Authority to an appropriate body, or act on anything relative thereto. (Inserted by Board of Selectmen)

Motion by E. R. Constantinides: Moved that the Town petition the General Court of the Commonwealth of Massachusetts to enact special legislation for the Town of Hull which legislation shall, in effect, enable the voters of the Town of Hull through a referendum question at a general or special election to abolish the Hull Redevelopment Authority, notwithstanding any provisions of M.G.L. Chapter 121b or any other law, provided that the question shall be so phrased that, should it be answered in the affirmative, provision shall be made for the orderly transfer of the duties and responsibilities of the Hull Redevelopment Authority to an appropriate body.

A ballot vote was taken with the following result:

| | |
|---|---|
| Yes | 154 |
| No | 73 |

So voted.
A true copy attest: _____

Town Clerk of Hull

## Appendix J.

TOWN CLERK:

THIS HEARING COULD GO ON FOREVER.

I WILL NOT EXPEND ANY MORE FUNDS FOR LEGAL FEES.

I WILL NOT SERVE UNDER THE UN-AMERICAN RULES OF 121B, WHICH ALLOWS THE SELECTMEN TO SUSPEND, AT WILL, FOR ANY REASON, ELECTED MEMBERS OF A HOUSING AUTHORITY OR A RE-DEVELOPMENT AUTHORITY AND THEN BE THE PROSECUTOR, JUDGE AND JURY WHO RENDER THE ULTIMATE VERDICT.

I HAVE ANSWERS AND CORROBORATING EVIDENCE TO ALL THE CHARGES DIRECTED TOWARD ME.

DUE TO THE UNFAIR BURDEN PLACED ON ME AND MY FAMILY, AND THE NEGATIVE WAY THIS HEARING AND SUSPENSION IS AFFECTING MY HEALTH, I HEREBY RESIGN MY ELECTED POSITION TO THE HULL REDEVELOPMENT AUTHORITY.

David B. Miller
4-8-82

17 Kenton Avenue
Hull, MA 02045
April 6, 1982

Town Clerk
Town of Hull
Atlantic Avenue
Hull, MA 02045

After much deliberation, I have decided not to pursue reinstatement procedures to the Hull Redevelopment Authority. I do not feel the lengthy hearings necessary to accomplish this would be beneficial to my present state of health. I do not wish to incur any further undue stress and financial burden to myself and my family.

During my five years and nine months on the HRA, I have always made my decisions with an open mind and in the best interest of the Town of Hull and the voters. In my opinion, I have never done anything illegal, immoral, unethical or been negligent of my duties.

Please be advised that I am resigning my position as an elected member of the Hull Redevelopment Authority effective immediately.

Sincerely,

_____

Richard A. Musmeci

RAM/am

937 Nantasket Ave.
Hull, Mass. 02045
May 11, 1982

Mrs. Claudette Fitzsimmons, Chairman
Board of Selectmen
Hull, Massachusetts

Dear Mrs. Fitzsimmons:

I looked into the possibility of retaining legal counsel to return for a final hearing, but the amount of money it would cost merely to bring a lawyer, unfamiliar with the case, up to a level of understanding where he could be of an assistance to me would be astronomical. Considering the expense it has already cost me, it would be a matter of having to remortgage my house and I don't feel I have the right to do that.

I am submitting my answers for the record as you asked me to do. I realize that what I am about to say now is only for your consideration as you deliberate on this decision, since I am not under oath, but I do want to point out a few things to you.

* * * * *

I will ask for no further hearing and you may now make whatever decision you feel you must.

Sincerely,

Nancy E. Dunn

[Notarization.]

## Appendix K.

[Objection and Argument at Bench Concerning Exclusion of Selectmen's Written Findings, Conclusions and Decision. Direct questioning of Defendant Selectwoman Fitzsimmons.]

**[16-78]**

Q. Now, who participated in writing the final decision?

A. We all did.

Q. And can you tell us approximately how long the writing of the final decision took?

A. We did a draft and we went back over them. I can't give you a definite time frame but it wasn't done overnight.

Q. Does the decision cover all of the 17 charges?

A. Yes, it does.

Q. Does it state the reasons for the findings under each of the 17 charges?

A. Yes, it does.

Q. Would you examine, please, Exhibit C that's on the witness stand.

(Witness complied.)

Q. Is that a copy of the final decision rendered by all the selectmen in the case of Mrs. Dunn?

A. Yes, it is.

MR. SIKORA: Your Honor, we would at this time **[16-79]** offer that exhibit into evidence.

MR. SCHWARTZ: Objection.

THE COURT: Okay. Basis?

MR. SCHWARTZ: Can we approach the side bar?

THE COURT: Yes.

(Conference at the side bar . . .

MR. SCHWARTZ: Your Honor —

THE COURT: You need to let me see the document.

MR. SCHWARTZ: This is one of the issues that is mentioned in our pretrial memorandum as one of the evidence questions likely to come up. And I refer in part to the same document.

Basically, Your Honor, this is a 96-page document that restates most of the testimony that references most of the exhibits. I think its prejudicial value so far outweighs its evidentiary value. It's merely corroborative of all this witness has testified to, to what Mrs. Burns testified and what I imagine the other two defendants are going to testify to. It goes into such depth and such detail on all this hearsay information that I think it is totally prejudicial to the defendants. And it would require the defendants [*sic*] to put in enormous amounts of evidence to rebut it.

MR. SIKORA: Your Honor, this is essentially the same issue we addressed yesterday. And I think it should be decided the same way for the same reasons. The complaint **[16-80]** attacks the decision head on. Paragraphs 43 and 46 say the decision was rendered in bad faith and is wrong. When I questioned Mrs. Dunn about this I asked her specifically whether she believed the decision to be wrong, to have caused her harm and was she suing for damages to redress that harm. And she answered yes to each of those questions. The decision is probative of the good faith thoroughness and diligence that the selectmen exercised when they rendered it.

I think that the concern that my brother has can be cured by a limiting instruction advising the jurors that this material does not have the quality of evidence that's brought into court. At the same time —

THE COURT: What's wrong? Is something wrong back there?

Hi. Is something wrong back there?

Sorry.

MR. SIKORA: At the same time, Your Honor, I think it should be admitted as well because in their proceedings under 121(b), Section 6, they are entitled to receive into evidence any kind of information that would be persuasive to a reasonable mind. They're not bound by the usual rules of evi-

dence. So, consequently, to reflect the job that they actually did, this is an accurate record and I think should be admitted for that reason as well.

I think a limiting instruction of the kind that we **[16-81]** have given twice concerning the oral testimony would be appropriate; but since it lies right at the heart of the case with regard to Mrs. Dunn, and the issue of good faith and the issue of correctness of the decision, it was their reasonable ground to find as they did. I think it's so critical, so central to the case that it must come in.

THE COURT: Isn't this clearly so? In other words, this document I take it is not a recollection of or a memorializing of some things that were testified to or so forth. It was a document, as I understand it, that the defendants depended upon in order to assist them in coming to the very decision. And so that this was what was in front of them. This is what they in part and in substantial part made determinations leading to their decisions as to the plaintiffs. And it's the very — it's a focus of the attack on the defendants that they acted arbitrarily and they acted in a way that violated the rights of the plaintiffs. And so isn't it like any other evidence that may hurt, showing the gun weapon, the weapon which happens to be a gun, showing the pictures of the fatality that is displayed to the jury to show the nature of the wounds and description of the person and so forth, et cetera? I don't know how this hurts any more than that?

And with limiting instructions for this I know exactly what the jurors ought to accept in evidence, like we do in every other situation, is thought to be at least sufficient.

**[16-82]** MR. SCHWARTZ: But may I suggest, Your Honor, that it's offered for such a limited purpose. One, it's offered only against one of the three plaintiffs. Two, it has no relation to Mr. Musmeci at all. It's only offered as to Dunn. Two, it's offered only for corroborative purpose, corroborative testimony that's already been given.

THE COURT: No. No, I don't know is that — this document indicates all that's been —

MR. SIKORA: No, of course this — as you have seen, I have condensed the actual grounds upon which they made their decision into much smaller capsules. So it's not purely corroborative. Again, the purpose is to show the magnitude and quality of the work that they did. And since good faith is right at the nub of the case, I think it's very probative they took the time and effort to do a thorough job.

MR. SCHWARTZ: Well, if all he wants to do is show how thorough a job it was, I will stipulate that they came up with a 96-page decision that weighs so many pounds, that it includes this sort of evidence. My problem is that it goes on to quote this witness said that, this witness said that it picks and chooses from what various witnesses said. It refers to some documents that were offered as exhibits, quotes them; it doesn't refer to others. It wasn't relied on as evidence itself. It's merely a restatement of their testimony —

THE COURT: I am going to attempt something here. **[16-83]** It is true in my mind at least that the burden is really on the opponent of this admission to show why it ought not to be introduced in light of the fact that the evidence is established that this served as a basis for them coming to their decision and in light of the fact this limiting instruction could be given and so forth. But I guess there is a point in which it is so overwhelming that a limiting instruction doesn't help all that.

MR. SCHWARTZ: That's what my point is.

THE COURT: Good for you. You're going to get an A. Wait a minute. The point is, though, that they've got to be what I am moving towards is that it's some sort of a balance. And plaintiffs' counsel suggests something.

The fact of the matter is if the parties agree and stipulate that one is we have defendants' Exhibit now marked C for identification purposes, that C is a document describing the

document. It's a document that outlines each and every complaint made and how it was dealt with. And this was made at an appropriate date and so forth, etc., that they trace each and every one of the allegations. And the response is that the board took and the parties agreed that it's so, then leave this marked as an exhibit named for identification because, as I said, this has been testified to.

If, in fact, there is any attempt to contradict or impeach that evidence, then I think we look at it again to see **[16-84]** why this does not come in to overwhelm that impeachment attempt. So if it's understood that this which the jury can see as a whole, as one document, which is however still marked for identification, outlines all of the — essentially all of the charges and all of the actions taken by the board and that it is the board — this is meant to be demonstration that the board took all of those actions and acted upon that, I think that's enough.

MR. SIKORA: I think it must come in, Your Honor, in light of the complaint.

THE COURT: Well, I have a burden — complaints don't go to the jury so it isn't like — the complaint doesn't go to the jury as such. And the stipulation suggests that every aspect of the complaint, the charges made emanated from the testimony, emanated from what they've already heard the testimony as to how they went about their business and so forth and that is documented by this exhibit marked for identification.

MR. SIKORA: But —

THE COURT: See, all I am worried about frankly is I want to be very sensitive about making the balance that's required when a document made outside of court can be introduced for the truth of what's asserted. And I've got to make the balance between what is so prejudicial that it may outweigh its probative value. It is clear that this is **[16-85]** probative. But there have been other ways to avoid or limit the prejudice

and I should do that. And if I were to find, however, that it becomes more probative because of other proffers by plaintiff or any one witness and so forth, etc., then that makes this which is marked for identification less prejudicial and more probative which may lead to its introduction.

MR. SIKORA: Here is my problem with it, Your Honor, is that Mrs. Dunn alleges in the complaint that the decision is simply wrong. It's biased, close minded, predetermined, and motivated by some ulterior objectives to get her or to accomplish this gambling scheme that has been suggested to the jury. She attacks the substance of the decision. To that extent it's the center of her theory. And I can't conceive of how the jury could make a decision upon that allegation without looking at this very decision that she's attacking.

In addition, when they made this decision the rules under which they were operating, a local municipal body did not require the information that they entertained to have the quality of judicial evidence so consequently everything that they examined and included in the decision does not violate any rules of their proceedings. Having said that —

THE COURT: There is another contention otherwise, is there?

**[16-86]** MR. SIKORA: Right. I can't conceive of how the plaintiff can complain that her civil rights have been violated, that she wants hundreds of thousands of dollars in compensation for that violation by reason of a decision which the jury never gets to see.

THE COURT: Well, they heard. That's what I am saying is that they've heard. You've gone laboriously through the allegations. She has made reference to what action they took and what conclusions they came to. So, if anything, even though I don't say this in absolute terms, they heard this. They've heard about rulings about why she is allowed to testify, that she did testify over the objection of defense. And so this

has some aspects of cumulativeness and it would tend to weaken the instruction that it is not offered for the truth of what's asserted, it's offered to establish the basis upon which they came to their decision. And that's something she's already testified to, so, if anything, this has — this is in the nature of what I say is cumulative and very borderline that I say, well, let there be a breach or let there be some further indication that, in fact, there is a challenge to this, then it becomes admissible. That's even if there was an argument made at the end.

It might well be that you could refer back to this item marked for identification and argue from it because it was so stipulated to by the parties. I still have to respond to **[16-87]** weight and prejudice. And so far I have heard no contradiction by cross-examination of others that there were the bases that they dealt with, that there is some disagreement as to what good faith applied to adjudicating this. But this is the kind of accumulation of proof that ordinarily would be excluded except it has this limited relevance that makes it come in not for the truth but to show that they acted upon information they received, which is consistent with their responsibilities and their oaths. And I think that's been stated and that's now —

MR. SIKORA: May I suggest this, Your Honor. I have a memo in the file on the subject. If you could take the issue under advisement for 24 hours and I can deliver my memo right now if you wish.

THE COURT: I will take whatever you want to give me, and so forth, etc. But for now I am not allowing it in. And as I've said before, now maybe the fourth time, is that if that door is opened, then it's never too late. She's already testified and so forth.

MR. SIKORA: Note my objection for the record.

. . . end of conference at the side bar.)

Q. (By Mr. Sikora) Mrs. Fitzsimmons, at any time in either bringing of the charges, the conduct of the hearings or your voting on the final decision, were you motivated by any ill will toward any of the redevelopment authority members personally?

* * * * *

[Cross-Examination of Plaintiff Nancy Dunn Concerning the Selectmen's Written Decision.]

Q. Now, at the end of the hearings, the Selectmen did produce a written decision; did they not?
A. Yes, they did.
Q. On the witness stand you will find Defendant's Exhibit for Identification C.
A. Yes.
Q. That is the written decision which you received, is it not, or a copy of that written decision?
A. Yes.
Q. That decision runs for 96 pages, does it not?
A. Yes, it does.
Q. You read the decision?
Q. A. Yes, I did.
Q. And you believe that that decision is wrong, do you not?
A. Yes, I do.
Q. Now, on 17 of the charges — from the 17 charges, you were found to be not liable for inefficiency or neglect on two of them; is that correct?
A. That's correct.
Q. Are those two results correct in your view?
A. That I never claimed to be an expert in anything, yes, that's correct.

Q. Well, you agree, certainly, with those two results?
A. Right.
Q. The other 15 you disagree with?
A. Right.

* * * * *

(2)

89-476

No. - .

Supreme Court, U.S.
FILED
OCT 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

# In The
# Supreme Court of the United States

OCTOBER TERM, 1989

TOWN OF HULL MASSACHUSETTS,
E. RENO CONSTANTINEDES
NANCY BURNS, CLAUDETTE FITZSIMMONS,
AND MYRON KLAYMAN,
INDIVIDUALLY AND
IN THEIR OFFICIAL CAPACITIES AS SELECTMEN,
PETITIONERS

*v.*

DAVID B. MILLER, NANCY DUNN,
and RICHARD MUSMECI,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COUR OF APPEALS
FOR THE FIRST CIRCUIT

**Brief for the respondents
in opposition to petition
for certiorari**

HARVEY A. SCHWARTZ*
DALE CAROLINE SCHNEIDER
SCHWARTZ, SHAW & GRIFFITH
205 Portland Street
Boston, Massachusetts 02114
(617) 227-2414

* Counsel of Record

54

## Contents

Table of authorities . . . . . iv

Constitutional and statutory provisions 2

Statement of the case . . . . . 3

Reasons why the petition should be denied. . . . . 4

I. The redevelopment authority members had a clear first amendment right to speak and vote as they felt best. They were punished because of their exercise of that right. . . . . 4

A. The petition misstates the facts in an attempt to portray the petitioners' motivation as concern for municipal finance. . . . . 4

B. The Selectmen punished the plaintiffs because of the content of the plaintiffs' speech . . . . . 10

C. The plaintiffs were punished for more than one specific vote. They were punished because of their continued support for the subsidized housing project. . . . . 25

D. This is not the proper case in which to determine whether the individual defendants were entitled to qualified immunity. . . . . 26

II. The decision by the redevelopment authority members not to exhaust their state administrative and judicial remedies does not bar action in federal court . . . . 29

A. The petitioners could not have served as fact finders at a fair hearing to conclusively determine their own culpability. . . . . 29

B. The petitioners fail to meet a single criteria for issue preclusion . . . . . 34

1. Different issues were litigated. . . . . 34

2. No issues were decided with respect to plaintiffs Miller and Musmeci. . . . . 36

3. The hearings before the Board of Selectmen were without authority to decide issues raised in this suit . . . 37

4. The plaintiffs did not receive a full and fair opportunity to litigate the issues at the hearings . . 38

III. The trial court did not commit reversible error by excluding the selectmen's final written decisio39

IV. The judgment was supported by other grounds not contested by the petitioners . . . . . 41

V. The petitioners' conduct in suspending the plaintiffs from their elected offices was improper as a matter of state law. . . . 43

A. The jury found the defendants violated the plaintiffs' right to hold public office as protected by the Massachusetts Declaration of Rights. . . 43

B. The Petitioners' conduct was improper even under the state statute authorizing the suspension of elected officials. . . . . 44

Conclusion . . . . . 46

## Table of authorities

### Cases

Allen v. McCurry
449 U.S. 90 (1980) . . . . .34,.38

Anderson v. Liberty Lobby, Inc.
477 U.S. 242 (1986) . . . . 3

Barnes v. McDowell
848 F.2d 725 (6th Cir. 1988) . 35

Bond v. Floyd
385 U.S. 116 (1966) . . . . .16,.27

Bunte v. Mayor of Boston
278 N.E.2d 709 (Mass. 1972) . . .45

Carlisle v. Phenix City Board of Education
849 F.2d 1376 (11th Cir. 1988) .35

Chema v. United States
No. 88-856 (and consolidated cases) . . . . . 13

Clark-Cowlitz Joint Operating Agency v. F.E.R.C.
826 F.2d 1074 (D.C. Cir. 1987) .34

Clarke v. United States of America
F.2d , 1989 U.S. App. LEXIS 14431 (September 26, 1989) . . . . . 17-19,.35

Collins v. Selectmen of Brookline
325 Mass. 562 (1950) . . . . . 30

Connick v. Myers
461 U.S. 138 (1983) . . . .22, 23

Food Employees v. Logan Valley Plaza, Inc.
391 U.S. 308 (1968) . . . . . 20

Garrison v. Louisiana
379 U.S. 64 (1964) . . . . . .24

Gildea v. Ellershaw
298 N.E.2d 847 (1973) . . . . . 29

Haring v. Prosise
462 U.S. 306 (1983) . . . .32, 36

Heath v. John Morrell & Company
768 F.2d 245 (8th 1985) . . . . 36

Hill v. Coca Cola Bottling Co. of New York
786 F.2d 550 (2nd Cir. 1986) . 36

Hutchinson v. Proxmire
443 U.S. 111 (1979) . .15, 21, 27

Jiminez Fuentes v. Torres Gaztambide
807 F.2d 236 (1st. Cir. en banc 1986) . . . . . 21

McDonald v. City of West Branch, Mich.
466 U.S. 284 (1984) . . . .31

New York Times Co. v. Sullivan
376 U.S. 254 (1964) . . . . 15, 16

Owen v. City of Independence, Mo.
445 U.S. 622 (1980) . . . . . .26

Pacific Gas & Elect. Co. v. Public Utilities Comm'n
475 U.S. 1 (1986) . . . . . .20

Patsy v. Board of Regents of the State of Florida
457 U.S. 496 (1982) . . . . . 33

Perry v. Sindermann
408 U.S. 593 (1972) . . . .22, 27

Pickering v. Board of Education
391 U.S. 563 (1968) . . . . . .22

Police Dept. of Chicago v. Mosely
408 U.S. 92 (1972) . . . . . 20

Rankin v. McPherson
U.S.
107 S.Ct. 2891 (1987) . . . . . 23

Riley v. National Federation of the Blind of N.C.
U.S.
108 S.Ct. 2667 (1988) . . . . . 24

Spence v. Washington
418 U.S. 405 (1974) . . . . . .21

Texas v. Johnson
U.S.
109 S.Ct. 2533 (1989) . . . . .20

Tinker v. Des Moines Indep. Community School Dist.
393 U.S. 503 (1969) . . . . . 21

United States v. City of Yonkers
856 F.2d 444 (2d Cir. 1988) . . 13

United States v. Utah Construction and Mining Co.
384 U.S. 394 (1966) . . . . . 38

Wooley v. Maynard
430 U.S. 705 (1977) . . . . . .20

Wrzeski v. City of Madison, Wis.
558 F. Supp. 664 (W.D. Wis.
1983) . . . . . .19

Statutes

28 U.S.C. sect. 1738 . . . . . 31

Mass. General Laws

c. 121B sect. 4 . . . . . 5

c. 121B sect. 5 . . . . . 5

c. 121B, section 6 . . . . . 44

c. 121B sect. 11 . . . . . 5

Massachusetts Civil Rights Act
c. 12, sect. 11I . . . . . 42, 43

Massachusetts Declaration of Rights
Article IX . . . . . 43, 44

Treatises

BLACK'S LAW DICTIONARY
Revised 4th Ed., 1968, p. 1748 .15

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

TOWN OF HULL MASSACHUSETTS,
E. RENO CONSTANTINEDES
NANCY BURNS, CLAUDETTE FITZSIMMONS,
and MYRON KLAYMAN,
individually and
in their official capacities as Selectmen,
PETITIONERS

v.

DAVID B. MILLER, NANCY DUNN,
and RICHARD MUSMECI,
RESPONDENTS

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

---

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION TO PETITION
FOR CERTIORARI**

The Respondents, who were plaintiffs and appellees in the courts below, respectfully request that this Court decline to issue a Petition for a writ of certiorari to review the judgment in this

case of the Court of Appeals for the First Circuit of June 21, 1989.

## Constitutional and statutory provisions

In addition to the First Amendment to the United States Constitution and 42 U.S.C. sect. 1983 cited in the Petition, this case involves the following:

1. Article IX of the Massachusetts Declaration of Rights:

> Art IX. All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

2. The Massachusetts Civil Rights Act, Mass. G.L. c. 12 sect. 11I:

> Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his

> own name and on his own behalf, a civil action ...

3. Mass. G.L. c. 121B sect. 6, which states in relevant part:

> The ... board of selectmen ... may, after hearing, remove any such member [of a redevelopment authority] because of inefficiency, neglect of duty or misconduct in office ...

**Statement of the case**

The respondents suggest that the statement of facts in the Petition misconstrues the trial evidence. The petitioners refuse to present the facts in the light most favorable to the plaintiffs and refuse to acknowledge inferences favorable to the plaintiffs, as they are required to do in this appeal from the denial of their directed verdict motions. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The respondents suggest the facts are correctly stated in the opinion of the

Court of Appeals located in the Petition at pages la-lla.

## Reasons why the Petition should be denied.

### I. THE REDEVELOPMENT AUTHORITY MEMBERS HAD A CLEAR FIRST AMENDMENT RIGHT TO SPEAK AND VOTE AS THEY FELT BEST. THEY WERE PUNISHED BECAUSE OF THEIR EXERCISE OF THAT RIGHT.

#### A. The Petition misstates the facts in an attempt to portray the petitioners' motivation as concern for municipal finance.

The plaintiffs were suspended from their elected offices because of their support for a subsidized elderly housing project in the Town of Hull, Massachusetts. The Petition attempts to categorize the redevelopment authority members' speeches, votes, writing and advocacy for this elderly housing project as unadorned "conduct" with no communicative content, outside the protection of the first amendment, conduct of a purely financial nature,

akin to signing a check. This contention is wrong factually and wrong legally.

The trial evidence showed a rancorous political dispute about whether the Hull Redevelopment Authority[1] should build a subsidized low-income elderly housing project or a luxury condominium complex and marina on a waterfront parcel in the town's redevelopment area. The plaintiff authority members supported the low-income elderly project. The defendant Selectmen opposed the elderly project and supported the luxury condominiums. The

---

[1] Under Massachusetts law redevelopment authorities are bodies politic and corporate separate from municipal government. Mass. G.L. c. 121B sect. 4. In towns such as Hull, four of the five authority members are elected by the public, the fifth is appointed by the state. Mass. G.L. c. 121B sect. 5. Authorities are empowered to take property by eminent domain, to clear and improve property and to contract for construction on that property. Mass. G.L. c. 121B sect. 11.

decision, by law, was the authority's to make.

Both sides freely stated their points of view. The constitutional line was crossed when just days after learning that advertisements were to be placed for construction bids for the elderly project the Selectmen suspended from their elected offices the three redevelopment authority members who supported the project while declining to suspend the one elected redevelopment authority member who opposed the project. The Selectmen then appointed interim authority members, who cancelled the contract for the elderly housing project.

The petitioners recite at length their purported concern for the detrimental impact the elderly project would have on town finances (Petition p. 16-19) and attempt to frame their opposition to the project as having been solely on

financial grounds. They do this because they propose creating an anomaly exempting speech concerning public finances from first amendment protection.

This characterization of the defendants' concern as having been only about the cost of the elderly housing project is contrary to the evidence. The defendants themselves testified about their non-financial motives for opposing the subsidized housing project. Constantinedes, the chairman of the Board of Selectmen, testified he opposed the low-income housing project because he was worried that if not enough low income people from Hull moved into the project "low income people from outside of Hull" would move into the apartments. (RA 1331) (references to the Record Appendix in the Court of Appeals will be prefaced "RA"). He did not want poor families arriving from outside of town. (RA 1330-

1331). Hull is located near Boston. Another defendant, Klayman, preferred that the luxury condominiums, rather than the low-income elderly project be built on that site. (RA 1281). Defendants Burns and Fitzsimmons testified they opposed the subsidized housing project. (RA 1054, 1071, 1103). The jury could have inferred from Burns' and Fitzsimmons' intensive lobbying efforts in the state legislature for a casino gambling bill for the Town of Hull and their reliance in part on the problems of the redevelopment authority as a ground for passage of this bill that their opposition to the project was based on fear that any development in the redevelopment area could jeopardize passage of the gambling legislation. (Petition p. 4a-5a).

The Court of Appeals found, "The evidence supports the jury finding that

plaintiffs were removed for speaking out and voting for a project to which the Board [of Selectmen] was opposed. This was a violation of their first amendment rights. It was also a violation of the Massachusetts Civil Rights Act." (Petition at p. 21a).

The evidence explicitly supported the jury's conclusion that the Selectmen punished the redevelopment authority members because the Selectmen wanted to stop the subsidized housing project for political reasons, not because of concern for the town's finances. In fact, the elderly housing project would have been built entirely with private funds, with no money coming from either HUD or the Town of Hull.2

---

2 The land was to be sold to the developer for $180,000. Payment was due April 1, 1982. The developer was to then own the property and the buidling he was required to construct.

The characterization in the Petition of the plaintiffs' conduct as simply rubber stamp financial action, not speech or expressive conduct, is factually wrong.

**B. <u>The Selectmen punished the plaintiffs because of the content of the plaintiffs' speech</u>.**

The chairman of the Hull Board of Selectmen ordered redevelopment authority members to vote "right now, tonight" (RA 1433) "to agree to amend the cooperation agreement[3] once and for all and limit the financial liability of the town" at a March 3, 1982 joint meeting of the Board

---

[3] The "Cooperation Agreement" was the 1968 contract by the Town of Hull, the Hull Redevelopment Authority and the Department of Housing and Urban Development that established the conditions for federal financial support of the redevelopment authority. The agreement called for all town agencies to cooperate with the redevelopment authority in carrying out the redevelopment project. The agreement could only be amended with the consent of HUD. (Petition p. 4a).

of Selectmen and the Redevelopment Authority (RA 1433-1434). Two of the three redevelopment authority members present, on the advise of their attorney, refused to vote as ordered.4 They were immediately suspended from office and charged with inefficiency and neglect of duty. The third member present, Alibrandi, said "he'd do whatever Reno [Constantinedes, the Selectmen's chairman] wanted him to." (RA 479, 1269, 1971). No charges were brought against him. He was not suspended from office.

The defendant Selectmen admitted at trial that if the other authority members "had said the same words Alibrandi said" they would not have been charged or suspended. (RA 1437, 1316, 1314, 1271).

---

4 Plaintiffs Miller and Dunn were present at the meeting. Plaintiff Musmeci, because of illness, could not attend the meeting. The third authority member present was Frederick Alibrandi.

No charge had anything to do with the refusal to amend the cooperation agreement. (Pet. p. 75a-81a).

A more direct, a more invidious violation of the right to freedom of expression is difficult to imagine. The jury agreed, answering "Yes" to the question, "Do you find that any of the defendants violated the rights of freedom of expression of the plaintiffs?" (RA 165). The First Circuit Court of Appeals unanimously agreed, saying, "Although we find no cases directly on point, probably because it is considered unassailable, we have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment. This is especially true when the agency members are elected officials. There can be no more definite expression of opinion than by voting on a

controversial public issue."5 (Petition p. 19a).

The Petition urges this Court to reject what the First Circuit deemed "unassailable" and adopt the position that "[s]uch conduct does not amount to protected First Amendment expression, as posited by the Court of Appeals. The

---

5 The Court of Appeals found (Petition p. 20a) United States v. City of Yonkers, 856 F.2d 444, 457 (2d Cir. 1988), involving a refusal by city officials to vote to fund public housing as ordered by a federal court "obviously does not apply to the situation before us." The Yonkers case is pending before this Court on appeals by the individual city officials. Chema v. United States, No. 88-856 (and consolidated cases). The first amendment issue in Chema bears no relation to the present case. Chema involves the question of whether a federal court can require a vote to put into effect a consent decree. The present case questions whether one elected official can punish a fellow elected official because of the content of the fellow official's public statements and votes.

commitment of public finances is action, not speech."[6] (Petition at p. 20).

The defendants rely on no authority for the proposition that votes, speeches, public discussions, decisions and policy statements of elected officials about a matter of great public concern have no communicative content and thus are speech outside the protection of the First Amendment. Exactly the opposite is the case.

"Voting and preparing committee reports are the individual and collective expressions of opinion within the legislative process." Hutchinson v.

---

[6] Because they reject the concept that the plaintiffs' support for the elderly housing project had any communicative content, the petitioners do not propose any sort of balancing test, strict scrutiny review, compelling state interest review or any of the free speech standards of review adopted by this Court.

Proxmire, 443 U.S. 111, 133 (1979).[7] "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment, as summarized in the opinion of New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), is that 'debate on public issues should be uninhibited, robust, and wide-open.' We think the rationale of The New York Times case disposes of the claim that [the plaintiff legislator's] statements fell outside the range of constitutional protection." Bond v. Floyd, 385 U.S. 116, 135-136 (1966).

---

[7] BLACK'S LAW DICTIONARY, Revised 4th Ed., 1968, p. 1748, defines "Vote" as follows: "The expression of his will, preference, or choice, formally manifested by a member of a legislative or deliberative body ..."

As to the Selectmen's suggestion that voting and advocacy by a legislator does not have First Amendment protection, the Supreme Court disposed of the identical claim in Bond, id., as follows:

> The State argues that the New York Times principle should not be extended to statements by a legislator because the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government. We find no support for this distinction in the New York Times case or in any other decision of this Court. The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators.

The Selectmen's assertion that elected officials have no First Amendment protection for their votes is completely rejected by the Bond decision.

A recent unanimous decision by the United States Court of Appeals for the District of Columbia Circuit, relying primarily on the First Circuit's decision

in the present case, held that votes of a legislator "constitute 'speech' protected by the First Amendment." In Clarke v. United States of America, F.2d , 1989 U.S. App. LEXIS 14431, p. 3 (September 26, 1989) members of the District of Columbia City Council challenged the Armstrong Amendment, a federal law requiring them to enact an exemption to the District's anti-discrimination law to permit religious educational institutions to discriminate against persons condoning homosexual acts, with the threat of cutting off all funding for the District if the councilors refused.

City Council members asserted the federal legislation coerced them to vote in a specific manner, violating their First Amendment right to vote as they chose. The District Court agreed, granting summary judgment for the

plaintiffs. The Justice Department, similarly to the defendants in the present case, argued that voting is not "protected speech." The Court of Appeals completely rejected this assertion, saying, 1989 U.S. App. LEXIS 14431, p. 21,

> A legislator's vote is inherently expressive. This is so, moreover, not simply because the act of voting requires a verbal utterance. Voting, as the Supreme Court has recognized, is the "individual and collective expression of opinion[] within the legislative process." Hutchinson v. Proxmire, 443 U.S. 111, 133 (1978). It serves the function not only of mechanically disposing of proposed legislation, but of registering the "'will, preference, or choice'" of an individual legislator on an issue of concern to the political community. Montero v. Meyer, 861 F.2d 603, 607 (10th Cir. 1988) (quoting BLACK'S LAW DICTIONARY 1414 (5th ed. 1979)), cert. denied, 109 S. Ct. 3249 (1989). For this reason, a legislator's voting record is "the best indication of [his or her] position on specific issues and his or her ideological persuasions." M. Barone & G. Ujifusa, THE ALMANAC OF AMERICAN POLITICS 1988 xviii (1988); see also id. at xvi-xviii (identifying

and describing eleven ideological scales for rating congressional voting records).

The only other case that could be found in which a suggestion was made that the act of voting is not protected speech was Wrzeski v. City of Madison, Wis., 558 F. Supp. 664 (W.D. Wis. 1983), in which a city council member challenged a regulation requiring each councilor to vote either "aye" or "no" on every question before the council. The court found, "Plaintiff's status as a legislator does not strip her of any rights she would otherwise enjoy under the First Amendment to speak freely or not speak at all," noting that "[l]egislators enjoy the same First Amendment protections as any other members of our society." 558 F. Supp. at 667. The Court enjoined the enforcement of the regulation.

Voting requires "speech," even if that speech is merely saying "yes" or "no." To vote as the Selectmen demanded required one redevelopment authority member to propose the matter to be voted on and another to second it. This is as much pure speech as requiring the state motto to be displayed on a license plate, Wooley v. Maynard, 430 U.S. 705 (1977), or requiring another party's literature in a utility's billing envelope, Pacific Gas & Elect. Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986).

Besides the spoken words, the very act of voting is expressive, certainly as expressive as burning an American flag, Texas v. Johnson, U.S. , 109 S.Ct. 2533, 2538-2540 (1989), or picketing, Police Dept. of Chicago v. Mosley, 408 U.S. 92, 99 (1972), Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308, 313-314 (1968), or

displaying a flag with a peace symbol attached, Spence v. Washington, 418 U.S. 405, 409-411 (1974), or wearing an armband, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505 (1969). The act of voting in favor of or in opposition to a specific matter of public concern explicitly conveys a particularized message of the legislator's opinion on that matter. Hutchinson v. Proxmire, supra.

The defendants refer to a line of cases dealing with discharges of public employees for the proposition that "official behavior" is not protected by the First Amendment. In fact, the cases hold just the opposite.8

---

8 The defendants' similar reliance on the "political discharge" cases, Jiminez Fuentes v. Torres Gaztambide, 807 F.2d 236, 241-242 (1st. Cir. en banc 1986), etc., is, to be frank, bizarre. While "a certain amount of leeway" is needed in a representative

(continued...)

In Connick v. Myers, 461 U.S. 138 (1983), relied on by the defendants, the Court applied the standard established in Pickering v. Board of Education, 391 U.S. 563 (1968) and Perry v. Sindermann, 408 U.S. 593 (1972) to distinguish between "speech concerning public affairs" and speech dealing only with the internal business of the employee's public employment. Speech on public issues "occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." Connick, 461 U.S. at 145 (citations

---

[8](...continued)
government, permitting government leaders to consider party affiliation in the hiring of their own confidential policymaking assistants, Jiminez-Fuentes, 807 F.2d at 241, the removal from office of elected public officials by their political opponents because of their political beliefs is the quintessential act of a dictatorship, not of a representative government. This is not "leeway," but is running the ship of state on the rocks.

omitted). Only when an employee "speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest" does the First Amendment not come into play when action is taken against the employee because of his speech. Connick, 461 U.S. at 147. See, Rankin v. McPherson, ___ U.S. ___, 107 S.Ct. 2891, 2902 (1987) (public employee's speech on a matter of public concern "lies at the heart of the First Amendment protection.")

The plaintiffs' statements and votes on the question of whether they should amend the cooperation agreement were quintessential "speech concerning public affairs." This was not private speech concerning only the agency's internal affairs. Their statements and votes favoring subsidized elderly housing were fundamental public discussions of government affairs. "Speech concerning

public affairs is more than self-expression; it is the essence of self-government. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

Just as their content-based discrimination was wrong so was the Selectmen's attempt to force the plaintiffs, on the threat of suspension from office, to vote in a specific manner. "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." Riley v. National Federation of the Blind of N.C., U.S. , 108 S.Ct. 2667, 2677 (1988) (emphasis by the Court).

The redevelopment authority members' advocacy and support for the elderly housing project was archetypal speech, explicitly and expressively communicating their views on a matter of public concern. They were punished because of

the content of that speech. Their first amendment rights were thus violated.

C. **The plaintiffs were punished for more than one specific vote. They were punished because of their continued support for the subsidized housing project.**

This case does not directly present the question of whether the act of voting constitutes protected speech. The plaintiffs' advocacy for the subsidized housing project involved years of public debate at redevelopment authority meetings, at town meetings, in the local press, and in the course of election campaigns, pervading their tenures on the redevelopment authority. The First Circuit Court of Appeals found the evidence supported the jury finding that the plaintiffs were removed from office because of their entire course of conduct in supporting the elderly housing project. (Petition 21a). Since this course of conduct included far more than

a single vote, even were the petitioners correct in their suggestion that the act of voting is not protected speech that contention would not require a reversal of the judgment.9

**b. This is not the proper case in which to determine whether the individual defendants were entitled to qualified immunity.**

The individual petitioners10 claim they were entitled to a qualified immunity from liability because in 1982 the law was not clear as to whether

---

9 That the defendants were motivated by more than just the plaintiffs' votes (or refusal to vote) at the March 3, 1982 meeting is incontestable. The plaintiffs were first suspended from office on March 1, 1982, which suspensions were voided, then reimposed March 3. The plaintiff Musmeci was not present at the March 3, 1982 meeting, yet he, too, was suspended from elected office.

10 Only the individual defendants could be entitled to qualified immunity. Owen v. City of Independence, Mo., 445 U.S. 622, 100 S.Ct. 1398 (1980). The judgment is against both the town and the individual officials.

acting in bad faith to remove elected public officials from office because of their political views would violate their first amendment rights. This issue should not be reviewed in this case for a number of reasons.

First, as the Court of Appeals found, "there was firmly embedded in our constitutional fabric the principle that government employees could not be discharged for reasons that infringed on the employee's right of freedom of speech. See, Perry v. Sinderman, 408 U.S. 593, 597 (1972)." (Petition p. 22a). The First Circuit also noted that in Bond, supra., the Supreme Court "specifically rejected the argument that elected officials have lesser first amendment rights than ordinary citizens." (Petition p. 22a). The Supreme Court noted in Hutchinson v Proxmire, supra., in 1978 that voting constitutes a legislator's

"expression of opinion." Town counsel, who advised the Selectmen before the suspensions, testified he was well aware that the removal of elected officials would involve certain constitutional rights. (RA 1458-1460). The plaintiffs' free speech rights were clearly established at the time they were suspended from office.

Second, even were the plaintiffs' first amendment rights not clearly established at the time, the petitioners do not contest that the plaintiffs' procedural and substantive due process rights were clearly established. The jury found violations of those rights. The judgment as to those counts would stand even were this Court to reverse the Court of Appeals as to the petitioners' immunity on the first amendment count.

Third, the individual defendants would also remain liable under the state civil

rights act count for violation of the state constitution. Immunity under Massachusetts law is "limited to public officers acting in good faith, without malice and without corruption." Gildea v. Ellershaw, 298 N.E.2d 847, 859 (1973). The jury specifically found the defendants did not act in good faith. (Petition p. 43a).

## II. THE DECISION BY THE REDEVELOPMENT AUTHORITY MEMBERS NOT TO EXHAUST THEIR STATE ADMINISTRATIVE AND JUDICIAL REMEDIES DOES NOT BAR ACTION IN FEDERAL COURT.

### A. The petitioners could not have served as fact finders at a fair hearing to conclusively determine their own culpability.

The petitioners suggest that the administrative hearings at which they sat as prosecutors, judges and finders of fact, hearings concerned solely with the conduct of the plaintiffs and not at all with the conduct of the Selectmen themselves, were equivalent to a state

judicial proceeding entitled to full faith and credit in the federal courts. They suggest they themselves made a finding as to the constitutionality of their own conduct and that their own findings preclude federal court reconsideration of this issue. This suggestion is preposterous. As a matter of state law the Selectmen's hearings were not "judicial" proceedings.11 As a matter of state law the findings of these hearings are not preclusive as to the issues in this civil rights action. As a matter of fact the Selectmen never considered or made any findings on the constitutionality of their own conduct. As a matter of common sense even had the Selectmen ever considered the

---

11 The removal of a redevelopment authority member "was the performance of an executive or administrative act rather than one of a judicial nature..." Collins v. Selectmen of Brookline, 91 N.E.2d 747, 749 (Mass. 1950).

constitutionality of their actions any findings of fact they made about their own conduct can not be considered "fair" as to the present plaintiffs.

Issue preclusion is grounded in the full faith and credit clause of the constitution and the federal full faith and credit statute, 28 U.S.C. sect. 1738, which provides in pertinent part that the "judicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such state ... from which they are taken." McDonald v. City of West Branch, Mich., 466 U.S. 284, 287-288 (1984) (emphasis by the Court). The Court held in McDonald that a labor arbitration finding was not a "judicial proceeding" such as to bar a federal civil rights action. Similarly, the

removal hearings conducted by the Selectmen were not a "judicial proceeding," as a matter of state law.

The Petition accuses the plaintiffs of following a "dual strategy" of undertaking state process and then switching to the federal courts for relief. The plaintiffs did not undertake any state process. They were charged and suspended from office without notice, hearing or choice. The Selectmen convened themselves as a hearing board without the plaintiffs' consent or discretion. The plaintiffs had no choice as to state process.[12]

The petitioners' suggestion, boiled to its essentials, is that once the

---

[12] Issue preclsuion is inappropriate "when the section 1983 claimant has not 'freely and without reservation submit(ted) his federal claims for decision by the state courts ... and then had them decided there ...'" Haring v. Prosise, 462 U.S. 306, 313 n. 7 (1983).

Selectmen themselves decided to charge and suspend the plaintiffs and to convene themselves as a hearing board, the plaintiffs were precluded from instituting a federal civil rights action until they had exhausted all their state court remedies.[13] The cry of "issue preclusion" by the petitioners is merely "exhaustion of state remedies" in sheep's clothing. It is axiomatic that exhaustion of state remedies is not required as a perquisite to federal civil rights suits. Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 501-517 (1982).

---

[13] It is questionable whether any realistic state court remedies were available. The hearings concluded March 12, 1983. (RA 255). Mrs. Dunn's and Mr. Musmeci's elective terms ended in early May 1983 (RA 121, 513), after which the question of their reinstatement would have been moot.

**B. The petitioners fail to meet a single criteria for issue preclusion.**

The defendants failed to make even a minimal showing of the requirements for issue preclusion to apply. Under the doctrine of issue preclusion, where a question of fact has been actually litigated and decided by a valid and final judgment the determination is ordinarily conclusive between the parties[14] in a subsequent action. Allen v. McCurry, 449 U.S. 90, 94 (1980).

**1. Different issues were litigated.**

Issue preclusion applies only to matters actually litigated and decided in a prior proceeding that were "essential" and "necessary" to that decision. Clarke-

---

[14] The absurdity of the petitioners' contention is most apparent in the suggestion that at the hearings at which they sat as "neutral" judges and fact finders they were also interested "parties."

Cowlitz Joint Operating Agency v. F.E.R.C., 826 F.2d 1074, 1079 n.4 (D.C. Cir. 1987). The only purpose of the Selectmens' hearings was to determine if the members of the redevelopment authority were guilty of charges. The hearings did not address the only issue presented by the plaintiffs in this suit: whether the Selectmen violated the plaintiffs' constitutional rights. See, e.g. Carlisle v. Phoenix City Board of Education, 849 F.2d 1376, 1379-80 (11th Cir. 1988) (plaintiff school principal was not precluded from litigating whether she was transferred because of racial discrimination where state judicial proceeding addressed only whether she was transferred without cause); Barnes v. McDowell, 848 F.2d 725, 731 (6th Cir. 1988) (public employee was not precluded from litigating whether he was discharged for exercising his First Amendment rights

where state proceedings addressed only whether the discharge was justified because employee had engaged in sexual harassment); Hill v. Coca Cola Bottling Co. of New York, 786 F.2d 550, 554 (2nd Cir. 1986) (plaintiff was not precluded from litigating whether his termination was racially motivated where prior proceeding before state unemployment insurance board addressed only whether termination was with cause).

**2. No issues were decided with respect to plaintiffs Miller and Musmeci.**

Plaintiffs Miller and Musmeci resigned after three hearings. (RA 2566, 2567). The hearings continued against Mrs. Dunn alone. Because no issues were actually litigated and decided with respect to these two plaintiffs, issue preclusion can not apply to them. Neither a judgment nor a finding of fact was made as to

them. Haring v. Prosise, 462 U.S. at 316.

**3. The hearings before the Board of Selectmen were without authority to decide issues raised in this suit.**

The Selectmen not only failed to address the issues raised by the plaintiffs in this suit, they were without power to do so. The hearings were conducted under the guise of Mass. G.L. c. 121B, section 6. This statute empowers the Selectmen only to make or receive charges against the redevelopment authority members. It does not empower the Selectmen to hear charges made against themselves. The Board's hearings can not give rise to issue preclusion as to the claims made by the plaintiffs in this action. Heath v. John Morrell & Company, 768 F.2d 245, 248 (8th Cir. 1985) (Issues decided by a state agency outside the scope of that agency's

authority can not give rise to collateral estoppel).

**4. The plaintiffs did not receive a full and fair opportunity to litigate the issues at the hearings.**

Issue preclusion will not apply where the parties did not have a "full and fair opportunity" to litigate an issue. Allen v. McCurry, 449 U.S. at 95. Where the prior proceedings are non-judicial, collateral estoppel will not attach unless the body conducting the inquiry was acting in a judicial capacity to resolve disputed issues of fact properly before it which the parties had an adequate opportunity to litigate. United States v. Utah Construction and Mining Co., 384 U.S. 394, 422 (1966). That was clearly not the situation at the Selectmen's hearings.

## III. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY EXCLUDING THE SELECTMEN'S FINAL WRITTEN DECISION.

The defendants suggest the trial judge improperly excluded the Selectmen's 96-page written findings on the charges against Mrs. Dunn. This decision was proper. It certainly was not reversible error. Admission or exclusion of evidence is committed to the discretion of the trial court. This is typical of a run of the mill discretionary evidentiary decision by a trial judge and need not be reviewed by this Court.

The Court of Appeals noted that the trial court "carefully weighed the probity of the evidence against its prejudicial and cumulative effects. It considered the efficacy of a limiting instruction. The defendants were allowed to put before the jury, via testimony, the information contained in the Board's

final decision." (emphasis added) (Petition p. 11a-12a).

The trial judge considered admitting the evidence subject to a limiting instruction but noted "there is a point in which it is so overwhelming that a limiting instruction doesn't help." (RA 1785, 1788). The judge said, "I want to be very sensitive about making the balance that's required when a document made outside of court can be introduced for the truth of what's asserted. And I've got to make the balance between what is so prejudicial that it may outweigh its probative value." (RA 1786).

Even if the trial court exceeded its discretion this Court should not review such a common evidentiary matter, dependent entirely on the facts of this one case. This is particularly so in the present case where the document at issue merely corroborated days of testimony and

was not even offered substantively. The document was relevant to only one of the three plaintiffs, Mrs. Dunn, and only two of the four individual defendants. (RA 1781, 1784). It was not offered for the truth of its contents, but merely to show the defendants' good faith. (RA 1789).

It is inconceivable that reading this document, rather than hearing its contents, would have affected the outcome of the trial.

## IV. THE JUDGMENT WAS SUPPORTED BY OTHER GROUNDS NOT CONTESTED BY THE PETITIONERS.

The complaint, (Petition p. 44a-54a), as it went to the jury, contained three counts alleging violations of the plaintiffs' federal constitutional rights to freedom of expression (Count One), to procedural due process (Count Two), and to substantive due process (Count Three), and one count under the Massachusetts civil rights act, Mass. G.L. c. 12 sect.

III, for violation of the right to hold elected office as protected by both the Massachusetts Declaration of Rights and the United States Constitution (Count Five).15

The petitioners contest only the verdict as to Count One, the free speech claim. Even were this Court to grant the Petition and reverse the judgment as to this count, the verdict as to the remaining procedural and substantive due process claims and the state civil rights act claims would stand and would provide adequate independent support for the judgment. For this reason the Petition should be denied.

---

15 The jury found for the defendants on Count Six, which alleged a state tort claim for intentional infliction of emotional distress. The trial judge, by stipulation, directed a verdict on Count Five.

## V. THE PETITIONERS' CONDUCT IN SUSPENDING THE PLAINTIFFS FROM THEIR ELECTED OFFICES WAS IMPROPER AS A MATTER OF STATE LAW.

### A. The jury found the defendants violated the plaintiffs' right to hold public office as protected by the Massachusetts Declaration of Rights.

The jury verdict is supported by an adequate independent state ground, a violation of the plaintiffs' rights to hold elected office as protected by Article IX of the Massachusetts Declaration of Rights.16

The Massachusetts Civil Rights Act, Mass. G. L. c. 12, sect. 11I, creates a private cause of action for violation by means of threats, intimidation or coercion of any right protected by, among other laws, the Massachusetts Declaration

---

16 Art IX. All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

of Rights. Count Five of the complaint stated a claim under the Massachusetts Civil Rights Act for deprivation of rights protected by Article IX. (Petition p. 53a). The jury specifically found the defendants "acted by threat, intimidation, or coercion so as to violate the rights of plaintiffs to hold public office as provided by the Massachusetts Constitution." (Petition 10a). This finding is wholly a matter of state law and should not be reviewed by this Court.

**B. The petitioners' conduct was improper even under the state statute authorizing the suspension of elected officials.**

The Selectmen acted under authority of Mass. G.L. c. 121B, sect. 6, which authorizes suspension and removal of a member of a redevelopment authority for inefficiency, neglect of duty or misconduct in office. The Massachusetts

Supreme Judicial Court has interpreted this statute to require a finding of an intentional violation of a known and significant rule or duty inherent in the obligations of office. "Otherwise stated, the rule or duty must be important enough so that its breach renders the officer unfit to continue to hold office." Bunte v. Mayor of Boston, 278 N.E.2d 709, 713 (Mass. 1972) "Errors of judgment cannot be construed as misconduct in office." Id. at 714.

Each defendant testified he or she was aware of this statute and was aware of the Bunte decision by the state's highest court. Each defendant testified he and she suspended the plaintiffs because of their errors in judgment. Each defendant testified he and she never felt the plaintiffs were unfit to continue to hold their elected offices.

Rather than scrupulously following the state statute, as the Petition suggests (Petition at p. 22) the Selectmen knowingly and intentionally conducted sham proceedings out of purely political motives. Their conduct was insupportable as a matter of state law and need not be reviewed by this Court.

## CONCLUSION

For all the above reasons the Petition for a writ of certiorari should be denied.

David B. Miller, et. al.
By their attorneys,

HARVEY A. SCHWARTZ*
DALE CAROLINE SCHNEIDER
Schwartz, Shaw & Griffith
205 Portland Street
Boston, MA 02114
(617) 227-2414

* Counsel of record